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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHARLES WAYNE ELMORE, Boatswain's Mate Third Class, United States Navy,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

Petition for a Writ of Certiorari to the United States Court of Military Appeals

---

PETITION FOR A WRIT OF CERTIORARI

JACK B. ZIMMERMANN
Counsel of Record
ZIMMERMANN & LAVINE, P.C.
770 South Post Oak Lane
Suite 620
Houston, TX 77056
(713) 552-0300

JOSEPH B. GILBERT
Major, U.S. Marine Corps

NAVY-MARINE CORPS APPELLATE REVIEW ACTIVITY
Washington Navy Yard
Building 111
Washington, D.C. 20374-1111
(202) 433-4161

QUESTIONS PRESENTED

1. Did the government deprive the Petitioner's rights to confrontation of witnesses, Due Process of law, and a fundamentally fair trial when the trial judge admitted, through third party witnesses and for a limited purpose, oral statements purportedly made by the alleged murder victim revealing her fear of the Petitioner and specific prior acts of violence by him?

2. Did the government deprive the Petitioner's rights to Due Process of law and a fundamentally fair trial, when a crucial prosecution expert witness improperly engaged in conversations and dined with the fact finders *ex parte* the first night of trial and ate breakfast with four of them the second day of trial?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
A. General Overview of the Case	2
B. Facts Pertinent to the First Question Presented	3
C. Facts Pertinent to the Second Question Presented	5
REASONS FOR GRANTING THE WRIT	7
I. THE GOVERNMENT DEPRIVED THE PETITIONER'S RIGHTS TO CONFRONTATION OF WITNESSES, DUE PROCESS OF LAW, AND A FUNDAMENTALLY FAIR TRIAL, WHEN THE TRIAL JUDGE ADMITTED, THROUGH THIRD PARTY WITNESSES AND FOR A LIMITED PURPOSE, ORAL STATEMENTS PURPORTEDLY MADE BY THE ALLEGED MURDER VICTIM REVEALING HER FEAR OF THE PETITIONER AND SPECIFIC ACTS OF VIOLENCE BY HIM	7
A. The Court Should Grant This Writ Because the Court of Military Appeals Has Rendered a Decision in Conflict With a Decision of the United States Court of Appeals for the D.C. Circuit, to wit: *United States v. Brown*, 490 F.2d 758 (D.C. Cir. 1973)	8

TABLE OF CONTENTS—Continued

Page

1. The Statements Were Admitted For a Limited Purpose, Yet the Courts Below Failed to Perform a Constitutional Analysis, Instead Re-labelling Them as Rebuttal Evidence 8

2. The Statements Purportedly Made By the Alleged Murder Victim Revealing Fear of and Specific Acts of Violence by the Petitioner Were Inadmissible Hearsay and Were Not Legally Relevant 10

B. The Court Should Grant This Writ Because the Court of Military Appeals Has Decided a Federal Question in Conflict With Courts of Last Resort in 26 of 33 Jurisdictions Which Have Decided the Question 11

C. The Court Should Grant This Writ Because the Petitioner Suffered Substantial Prejudice Due to the Trial Court's Fatally Flawed Reasoning 11

D. The Court Should Grant This Writ Because the Statements Purportedly Made by the Alleged Murder Victim Were Unreliable and Their Admission Violated the Petitioner's Right to Due Process of Law 14

1. These Statements Were Wholly Unreliable 14

2. The Trial Court's Admission of These Statements Constituted Plain Error 15

TABLE OF CONTENTS—Continued

Page

II. THE GOVERNMENT DEPRIVED THE PETITIONER'S RIGHTS TO DUE PROCESS OF LAW AND A FUNDAMENTALLY FAIR TRIAL, WHEN A CRUCIAL PROSECUTION EXPERT WITNESS IMPROPERLY ENGAGED IN CONVERSATIONS AND DINED WITH THE FACT FINDERS *EX PARTE* THE FIRST NIGHT OF TRIAL AND ATE BREAKFAST WITH FOUR OF THEM THE SECOND DAY OF TRIAL 16

A. The Court Should Grant This Writ Because the Court of Military Appeals Has Rendered a Decision in Conflict With the Court's Decisions, to wit: *Remmer v. United States*, 347 U.S. 227 (1954); and *Mattox v. United States*, 146 U.S. 140 (1892) 16

B. The Court Should Grant This Writ Because This Case Presents Circumstances Which Demonstrate That Due Process Requires a Presumption of Implied Bias, and the Evidence of Record Did Not Overcome That Presumption 17

CONCLUSION 19

APPENDIX A

(Order of the U.S. Court of Military Appeals denying the Petition for Reconsideration) 1a

APPENDIX B

(Opinion of the U.S. Court of Military Appeals) 2a

APPENDIX C

(Opinion of the U.S. Navy-Marine Corps Court of Military Review) 26a

TABLE OF CONTENTS—Continued

APPENDIX D Page

(Citations to the 31 Jurisdictions which follow the reasoning in *United States v. Brown*, 490 F.2d 758 (D.C. Cir. 1973) (Including the Courts of Last Resort in 26 Jurisdictions)) 49a

TABLE OF AUTHORITIES

Cases: Page

Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866) 5
Ex parte Quirin, 317 U.S. 1 (1942) 5
Fox v. United States, 421 A.2d 9 (D.C. 1980) 8
Houston v. State, 531 So.2d 598 (Miss. 1988) 13
Mattox v. United States, 146 U.S. 140 (1892) 16
Mu'Min v. Virginia, —— U.S. ——, 111 S. Ct. 1899 (1991) 16
Murphy v. Florida, 421 U.S. 794 (1975) 16
O'Callahan v. Parker, 395 U.S. 258 (1969), *overruled by Solorio v. United States*, 483 U.S. 435 (1986) 17
Ohio v. Roberts, 448 U.S. 56 (1980) 14
Remmer v. United States, 347 U.S. 227 (1954) 16
Smith v. Phillips, 455 U.S. 209 (1982) 16, 17
Solorio v. United States, 483 U.S. 435, *reh'g denied*, 483 U.S. 1056 (1987) 17
State v. Cameron, 100 Wash. 2d 520, 674 P.2d 650 (1983) 14
United States v. Brown, 490 F.2d 758 (D.C. Cir. 1973) 8, 10, 11
United States v. Frady, 456 U.S. 152, *reh'g denied*, 456 U.S. 1001 (1982) 15
Whelchel v. McDonald, 340 U.S. 122 (1959) 5
White v. Illinois, —— U.S. ——, 60 U.S.L.W. 4094 (U.S. Jan. 15, 1992) 15

Constitution and statutes:

U.S. Const.:

Amendment V 2
Amendment VI 2

Uniform Code of Military Justice:

Art. 25, 10 U.S.C. § 825 18
Art. 118, 10 U.S.C. § 918 2

Miscellaneous:

Francis A. Gilligan and Frederic I. Lederer, Court-Martial Procedure § 15-11.00 (1991) 18
George Washington, 2 THE WRITINGS OF GEORGE WASHINGTON 501 (Worthington C. Ford ed., 1889) 17

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Charles Wayne Elmore, Boatswain's Mate Third Class, United States Navy, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals rendered in this proceeding on September 30, 1991. The lower court denied the Petition for Reconsideration on November 12, 1991.

OPINIONS BELOW

The order of the United States Court of Military Appeals, denying the Petition for Reconsideration on November 12, 1991 is reprinted as Appendix A.

The opinion of the United States Court of Military Appeals, *United States v. Elmore*, 33 M.J. 387 (C.M.A. 1991), is reprinted as Appendix B.

The opinion of the United States Navy-Marine Corps Court of Military Review, *United States v. Elmore*, 31 M.J. 678 (N.M.C.M.R. 1990), is reprinted as Appendix C.

JURISDICTION

28 U.S.C. § 1259(3) provides jurisdiction in this case and entitles the Petitioner to seek review of the United States Court of Military Appeals' decision affirming his conviction.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V (in pertinent part):

> No person shall be . . . deprived of life, liberty, or property, without due process of law[.]

Amendment VI (in pertinent part):

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and . . . to be confronted with the witnesses against him[.]

STATUTE INVOLVED

10 U.S.C. § 918, Article 118, Uniform Code of Military Justice (in pertinent part):

> Any person subject to this chapter who, without justification or cause, unlawfully kills a human being, when he . . . has a premeditated design to kill . . . is guilty of murder, and shall suffer such punishment as a court-martial may direct[.]

STATEMENT OF THE CASE

A. General Overview of the Case.

The Petitioner was an American sailor convicted at a military installation in Australia for murdering his wife. The government theorized that he stabbed his wife and threw her body into the sea. The case was entirely cir-

cumstantial, because the government recovered no corpse, body parts, bloody clothing or murder weapon. The Petitioner did not confess, and no eyewitness claimed to have seen the murder of the Petitioner's wife. A woman resembling Mrs. Elmore was later reported to be seen in nearby cities by two witnesses who testified at trial, and by another whose affidavit was introduced on a motion for a new trial. On the other hand, Mrs. Elmore never returned home after her disappearance. The government based its case on the inference arising from her disappearance, inconsistent exculpatory pretrial statements made by the Petitioner before trial, and statements purportedly made by the victim expressing fear of the Petitioner and relating prior alleged acts of violence by him against her. An expert witness provided key testimony (contradicting opinions held by the Australian police and defense expert witnesses) and opined that blood stains on a bed sheet from the Petitioner's home were not the result of menstrual flow, thus creating the inference that the Petitioner stabbed his wife in their bedroom. The means used by the government to present this case were hotly contested in the trial and lower appellate courts, and resulted in the two questions presented to the Court.

B. Facts Pertinent to the First Question Presented.

The judge denied in part a defense motion in limine at a pre-trial hearing. That motion sought to prohibit testimony by third persons regarding statements purportedly made by the alleged victim. The defense set out specific statements considered to be objectionable. Prior to admitting the testimony, at another pre-trial hearing, the judge stated that, based upon evidence already adduced, there was "some evidence of accident, for lack of a better word." He then ruled that this appeared to be a material issue in the case. Therefore, any statements Mrs. Elmore made to third parties were admissible to establish her state of mind as to her fear of the Petitioner on the night in question. Because the Petitioner had admitted walking

toward her on a pier on the night of March 16, 1988, but explained that she fell into the water, the judge indicated that her alleged fear might establish her actions. The judge indicated that the Petitioner's statements to the Australian police regarding the events of March 16, 1988 placed her state of mind in issue.[1]

Pursuant to the above ruling, the following purported out-of-court statements by Mrs. Elmore indicating her fear of the Petitioner were introduced as evidence:

> "She [Mrs. Elmore] told me that she was scared of Wayne."
>
> "I told her to leave and she said she can't because she knows that he's going to follow her and he's frightened her that he's gonna kill her."
>
> "She told me that he always frighten [sic] her."
>
> "She said that she believed that her husband is going to kill her."

In addition, the following purported out-of-court statements by Mrs. Elmore indicating specific acts of violence by the Petitioner toward her were introduced in evidence:

> "She told me that Wayne tried to kill her."
>
> "One day she come [sic] to my house and she told me that Wayne tried to push her off the boat."
>
> "She told me that Wayne—she was in the bedroom and Wayne came in and he grab [sic] a pillow he push [sic] her at the bed and he put that on her face."
>
> "And she said that when she went out to the door, Wayne grab [sic] her at the hair and she fell down and she said . . . Wayne told her if she leave, [sic] he's going to kill her."
>
> "One day she told me that they went fishing one day and Wayne has a knife and he's doing something and [Mrs. Elmore] ask [sic] if the knife was sharp and

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[1] These statements had been introduced by the government during its case in chief.

> Wayne said, 'Yeah. Let me try this on you.' He said, 'You want me to try this on you?' "
>
> "I said, 'I only have $10 Australian [dollars],' and I asked her what she's [sic] going to do with the money and she said she wants to come to my house. And I ask her where she at. She said, 'I'm on base right now.' And I ask her what's wrong and she said that she has a fight with Wayne and he—she said that Wayne tried to choke her."
>
> "She said that Wayne tried to choke her."
>
> "She told me one time that Elmore almost killed her."

The judge instructed the court members (jurors)[2] that they could consider this evidence for the limited purpose of determining Mrs. Elmore's state of mind (regarding her fear of the Petitioner and the status of their marriage).

C. Facts Pertinent to the Second Question Presented.

Because this case was tried in Australia, the government brought the trial judge, prosecution, appointed defense counsel (military),[3] and four of the seven potential jurors from Hawaii. In addition, a key government witness, Mr. David F. Werner, offered as an expert in serology, flew in from Georgia. On the evening of the first day's proceedings, Mr. Werner dined with all seven potential jurors. He told them that he was a Criminal Investigation Division (CID) agent and that he

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[2] The Petitioner recognizes that the right to trial by jury is inapplicable to members of the armed forces. *See Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *Ex parte Quirin*, 317 U.S. 1 (1942); *Whelchel v. McDonald*, 340 U.S. 122 (1959). However, the members appointed by the commander convening the court serve the same fact finding role as civilian jurors. The Petitioner will hereinafter refer to the court members as the "jurors."

[3] The Petitioner was represented at trial by a Navy JAG Corps Lieutenant and an Australian civilian attorney.

worked at the Army's Atlanta Crime Lab. He said that he did a lot of traveling and had been at previous courts-martial. He also indicated that he had worked with the FBI on various cases and had testified in other cases. The dinner lasted approximately one hour, during which they discussed topics of general interest as well as some of Mr. Werner's previous cases in various parts of the world. The next morning, Mr. Werner had breakfast with four jurors and he rode in the same van with them to court. That day, all the affected jurors participated in *voir dire* and the defense counsel challenged the array for cause. The trial judge denied the challenge and eventually five jurors heard the case, and contrary to his pleas, convicted the Petitioner of premeditated murder and sentenced him to life imprisonment.[4]

Three weeks prior to trial, the judge had instructed the potential jurors, in writing, that they were not to discuss the case with anyone or among themselves. When the judge learned of the out-of-court contacts, he questioned the potential jurors. None admitted that his decision would be affected by the incidents. However, Commander Cooper, who served as president (foreman) of the panel, testified:

> He is staying at the same hotel with us, recognized us from being on the airplane, knew that we were here for the—for the court-martial and just came down to dinner with us and joined us. He also rode in on the bus with us from the airport. He indicated at that time that he was from CID in Atlanta and that he was a potential witness.

Another potential juror, Lieutenant Commander (LCDR) Griffin (later challenged peremptorily), testified, ". . . after a while we did find out that that's what he was here as a witness for." Lieutenant Anderson (later

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[4] The judge granted one challenge for cause because the juror had been a civilian police officer, and the defense exercised its sole peremptory challenge.

challenged for cause) testified, "He said he was a witness. He said he was a witness to the court-martial." LCDR Griffin added that Mr. Werner "seemed to be competent in his job," while LCDR Gilchrist (who served as a juror) characterized him as "personable," and indicated he knew that Mr. Werner "had been involved with various investigations for some period of time."

Mr. Werner admitted to the judge that he had spoken to them at length about his credentials and experience, and that he knew that "you generally should not . . . speak to members before the trial." Mr. Werner described the first evening's contact with the jury as "generally congenial." The judge denied the defense motion for a mistrial, finding no bias resulting from the out-of-court *ex parte* contacts.

REASONS FOR GRANTING THE WRIT

I.

THE GOVERNMENT DEPRIVED THE PETITIONER'S RIGHTS TO CONFRONTATION OF WITNESSES, DUE PROCESS OF LAW, AND A FUNDAMENTALLY FAIR TRIAL, WHEN THE TRIAL JUDGE ADMITTED, THROUGH THIRD PARTY WITNESSES AND FOR A LIMITED PURPOSE, ORAL STATEMENTS PURPORTEDLY MADE BY THE ALLEGED MURDER VICTIM REVEALING HER FEAR OF THE PETITIONER AND SPECIFIC ACTS OF VIOLENCE BY HIM.

This case presents an important federal question that transcends the military setting in which it took place and strikes at the heart of the Fifth and Sixth Amendments of the United States Constitution: an accused's rights to due process and confrontation of witnesses against him. In the present case, the Petitioner was not permitted to confront or cross-examine his chief accuser, his allegedly deceased wife, Mrs. Elmore, whose hearsay statements that she feared the Petitioner and had been threatened by him, as testified to by third parties at trial, was the

most incriminating evidence in the prosecution's entirely circumstantial murder case.

A. The Court Should Grant This Writ Because the Court of Military Appeals Has Rendered a Decision in Conflict With a Decision of the United States Court of Appeals for the D.C. Circuit, to wit: *United States v. Brown*, 490 F.2d 758 (D.C. Cir. 1973).

The Court of Military Appeals' holding that this hearsay evidence was admissible simply underscores the substantial, nationwide split of authority on this crucially important issue and the vital need for this court to resolve this conflict. This split is pervasive: courts of last resort in 26 of 33 jurisdictions—the District of Columbia, and 32 states—and intermediate appellate courts in five other states, where the highest courts have not ruled, have decided this issue contrary to the Court of Military Appeals.

In the Nation's capital, a defendant tried in federal district court at the intersection of Constitution Avenue and John Marshall Place, N.W., is assured that hearsay statements of fear by the deceased are inadmissible, *see, e.g.*, *United States v. Brown*, 490 F.2d 758 (D.C. Cir. 1973); *Fox v. United States*, 421 A.2d 9 (D.C. 1980). Now the reverse is true for that same defendant if tried in another federal court in the District of Columbia, a court-martial at the intersections of 9th and M Streets, S.E., because the Court of Military Appeals has ruled that such statements are admissible in cases tried before military courts.

1. *The Statements Were Admitted For a Limited Purpose, Yet the Courts Below Failed to Perform a Constitutional Analysis, Instead Relabelling Them as Rebuttal Evidence.*

The Court of Military Appeals erred in its opinion below in evaluating this issue. The trial judge admitted the out-of-court statements for a limited purpose, instructing the jurors as follows:

> You are to consider this evidence for the limited purpose of *establishing what her state of mind was* —whether or not she feared the accused and as it went to their marital status. You may not consider the evidence for any other purpose. . . .

United States v. Elmore, App. 17a (emphasis added).

Before the Court of Military Appeals, the Petitioner forcefully argued that the admission of these out-of-court statements from third parties under the state of mind exception (Mil. R. Evid. 803(3)) was error under persuasive authority of *United States v. Brown*, *supra*, and the majority of state courts which had addressed the subject. Without mentioning the state court majority view, the Court of Military Appeals summarily rejected *United States v. Brown* as follows:

> In principle, we have no disagreement with *Brown*; but like the Court of Military Review, we conclude that *Brown* is inapplicable to our analysis because we *do not review that alternate theory of admissibility.*

United States v. Elmore, App. 20a (emphasis added).

The thrust of the Petitioner's contention was and is the following: The state of mind exception was not an *alternate* theory of admissibility. It was the *only* purpose permitted by the trial judge's limiting instruction.

In essence, the Courts below did not review the challenged evidence for a limited purpose, as permitted by an exception to the hearsay rule, as the fact finders were required to do. Those Courts viewed the testimony as rebuttal evidence. They wholly failed to determine if the confrontation clause or due process clause were violated.

2. *The Statements Purportedly Made By the Alleged Murder Victim Revealing Fear of and Specific Acts of Violence by the Petitioner Were Inadmissible Hearsay and Were Not Legally Relevant.*

The crucial legal reason for excluding statements allegedly made by a victim in a case where the defendant denies having killed the victim is that such statements, even if made, *are not relevant*. Whatever her mental state, such evidence does not make it more probable than not that the defendant killed the victim.

The Petitioner has searched the law interpreting this issue under Rule 803(3) of both the Federal and Military Rules of Evidence and its predecessor case law. The seminal decision, interpreting both pre-existing law and Rule 803(3) as it applies to a deceased's statements in a homicide prosecution, is *United States v. Brown*, *supra*. It strongly supports the Petitioner's position. The United States Court of Appeals for the District of Columbia Circuit wrote:

> Briefly stated, the state of mind exception to the hearsay rule allows the admission of extrajudicial statements to show the state of mind of the declarant at that time if that is at issue in the case. It also allows such statements to show a future intent of the declarant to perform an act if the occurrence of that act is at issue.

United States v. Brown, *supra*, 490 F.2d at 762 (citations omitted).

The Court of Appeals then analyzed the rule, focusing on homicide cases where the issue is the admissibility of a statement made by the deceased to one who is later called to testify at trial. The analysis consisted of a balancing process, examining relevance and prejudice.

Addressing relevance in this type of case, the Court of Appeals determined that the need for statements of fear of the defendant by the victim makes them admissible despite the prejudice only in the three "well-defined cate-

gories" of self-defense, suicide, and accidental death. *Id.* at 767. None of these exceptions exists in the instant case. There was no claim of self-defense, suicide was not proffered as a defensive theory, and the defense never asserted any struggle over a death instrument or any other accidental killing *by the Petitioner.*

B. The Court Should Grant This Writ Because the Court of Military Appeals Has Decided a Federal Question in Conflict With Courts of Last Resort in 26 of 33 Jurisdictions Which Have Decided the Question.

In the intervening nineteen years since the *United States v. Brown* decision, no United States Court of Appeals has decided this issue inconsistently with *Brown*, and 31 of the 38 jurisdictions that have addressed this issue have followed the principles set out in *Brown*. *See* Appendix D.

C. The Court Should Grant This Writ Because the Petitioner Suffered Substantial Prejudice Due to the Trial Court's Fatally Flawed Reasoning.

The Court of Appeals in *Brown* emphasized that the prejudice flows from "the danger of jury *misuse* of the evidence." *Id.* at 764 (emphasis in original). The Court of Appeals concluded that limiting instructions are ineffective in a homicide case, where the improper purpose for which the jury might consider the evidence bears closely on the central question of a defendant's guilt or innocence. *Id.* at 766.

In explaining the inherent dangers of prejudice through misuse the court analyzed the hypothetical hearsay statement "I am afraid of D—he beat me last week." *Id.* at 776. Since the statement is so close to the ultimate issue, the danger is enhanced by allowing the jury to assume the truth of the allegation of past misconduct. *Id.* The Court reasoned that "[s]ince such statements could be considered too prejudicial to be admitted even where the victim's state of mind is quite relevant, they would

certainly be inadmissible where there is only a peripheral relevance to the case." *Id.* at 776, n.56. The same reasoning is clearly pertinent to the case at bar.

The murder conviction in *United States v. Brown* was reversed because the victim's statement "I am afraid I will be killed by Roland Brown," while not an allegation of past acts or threats, could lead the jury to infer that Brown was capable of murder, had done things to the victim in the past to justify this fear, or that Brown had threatened the victim's life before. All of these inferences would reflect on the *defendant's* intentions or past conduct, and would be improper. Further, the statement was extremely closely related to the issues at hand. *Id.* at 778-79. Thus prejudice was found.

Similarly, in this case, the hearsay statements allowed the jurors to infer that the Petitioner was capable of murder, had done things to the alleged victim in the past to justify her fear of him, and that the Petitioner had threatened her life before. The inferences are so close to the central question of the Petitioner's guilt or innocence that the limiting instruction was ineffective. There is no meaningful difference between the statements of fear in this case and those in *Brown*.

The error is obvious and substantial in this wholly circumstantial case. Since these statements were the only evidence from which to infer an intent to kill, the prejudical impact of their admission on the jury's deliberations must have affected the fairness and integrity of the proceedings, thus constituting plain error.

The trial judge set forth the following reasons for admitting the above statements by Mrs. Elmore pursuant to the state of mind exception to the hearsay rule:

> Trial Judge: That's right. *Her state of mind. Her fear* of the—her fear of the accused specifically.
>
> Defense Counsel: Well, I'm not sure how I understand her fear of the accused to be relevant if it's

> already established and the government and the defense agree that she did intend to leave Exmouth and she did so try to leave. I don't see the government's connection between the two.
>
> Trial Judge: Well, what about her actions on the pier that night? I mean, we've got testimony of the accused basically through the police officer that this woman was moving away from her husband down the pier, tripped and fell into the water. That—there's no away around that. You know, even if the accused exercised his right to remain silent, that is in evidence right now and it's going to have to be instructed upon. So, that's what I'm telling you—that the woman's state of mind has suddenly become a very critical issue in this case as to any—

(emphasis added).

The trial judge's reasoning is fatally flawed. The Petitioner's pretrial statements to the Australian investigators, which were admitted into evidence through their testimony, did not put *Mrs. Elmore's* state of mind in issue. The Petitioner's pretrial statements simply indicated that Mrs. Elmore fell off the pier when she slipped off the edge. The Petitioner never indicated in any way that he threatened Mrs. Elmore, or that she reacted to him out of fear and thus slipped off the edge of the pier. Hence the trial judge admitted statements showing Mrs. Elmore's state of mind based upon the false assumption that the Petitioner's pretrial statements had put her state of mind in issue.

Furthermore, it was not the Petitioner who introduced this evidence, it was the *government* in its case in chief. The government cannot "build a strawman and then knock it down." *Houston v. State*, 531 So.2d 598, 607 (Miss. 1988). The Supreme Court of Washington State was faced with a similar claim—that the defendant's statement raised the exception pertaining to self-defense. In reversing a murder case on this ground, that court

ruled: ". . . self-defense was a non-issue raised solely by the State. It was injected into the trial during the State's case in chief when the State admitted in evidence petitioner's taped confession which has been set forth in detail above. Nothing in the confession attempted to justify the killing by the fact that she possessed a knife. There was no assertion of self-defense in the true legal sense." *State v. Cameron*, 100 Wash. 2d 520, 674 P.2d 650, 655 (1983). That reasoning applies directly to the case at bar if the word "accident" replaces "self-defense."

D. The Court Should Grant This Writ Because the Statements Purportedly Made by the Alleged Murder Victim Were Unreliable and Their Admission Violated the Petitioner's Right to Due Process of Law.

1. *These Statements Were Wholly Unreliable.*

The out-of-court statements by Mrs. Elmore were wholly unreliable. The Petitioner had neither the *opportunity* to cross-examine Mrs. Elmore nor the "equivalent of significant cross-examination." *Ohio v. Roberts*, 448 U.S. 56, 70 (1980). At the time she allegedly made these statements, Mrs. Elmore was not under oath, the Petitioner was not represented by counsel, and her testimony was not before a judicial tribunal.

There are other reasons why the testimony in the instant case was unreliable. First, the alleged statements by Mrs. Elmore were of such a volatile nature that they showed animosity toward the Petitioner. Such statements might be the result of exaggeration, or even complete falsehood, by either Mrs. Elmore or the witnesses who testified against the Petitioner. Second, the Court has stated that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." *Ohio v. Roberts, supra*, 448 U.S. at 66. Just last month, the Court stated, "But

where proffered hearsay has sufficient *guarantees of reliability* to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied." *White v. Illinois*, —— U.S. ——, 60 U.S.L.W. 4094, 4097 (U.S. Jan. 15, 1992) (emphasis added). As developed more fully above, the hearsay statements in the case at bar did *not* fall within a "firmly rooted hearsay exception" because the *declarant*'s state of mind was not in issue. Third, as noted in the concurring opinion by Justice Thomas, with whom Justice Scalia joined, "Reliability is more properly a due process concern." *Id.* at 4099.

2. *The Trial Court's Admission of These Statements Constituted Plain Error.*

The Court of Military Appeals noted (App. 22a), and the Court of Military Review gave as its primary reason to affirm (App. 39a), that the Petitioner failed to object to admission of this testimony at trial, despite the earlier motion in limine. However, where plain error is present, the Court is permitted to overlook the absence of a defense objection, just like it is under Rule 52(b) of the Federal Rules of Evidence. The Court has defined plain errors as "particularly egregious errors," such that the "trial [was] infected with error so 'plain' the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *United States v. Frady*, 456 U.S. 152, 163, *reh'g denied*, 456 U.S. 1001 (1982).

II.

THE GOVERNMENT DEPRIVED THE PETITIONER'S RIGHTS TO DUE PROCESS OF LAW AND A FUNDAMENTALLY FAIR TRIAL, WHEN A CRUCIAL PROSECUTION EXPERT WITNESS IMPROPERLY ENGAGED IN CONVERSATIONS AND DINED WITH THE FACT FINDERS *EX PARTE* THE FIRST NIGHT OF TRIAL AND ATE BREAKFAST WITH FOUR OF THEM THE SECOND DAY OF TRIAL.

A. The Court Should Grant This Writ Because the Court of Military Appeals Has Rendered a Decision in Conflict With the Court's Decisions, to wit: *Remmer v. United States*, 347 U.S. 227 (1954); and *Mattox v. United States*, 146 U.S. 140 (1892).

The Court has long held that circumstances which compromise a jury are deemed presumptively prejudicial, and create a heavy burden, resting upon the government, to establish that third party contact with the jury was harmless to the defendant. *Remmer v. United States*, 347 U.S. 227 (1954) (citing *Mattox v. United States*, 146 U.S. 140 (1892)).

Due process requires that the trial judge be ever watchful to prevent prejudicial occurrences and that a hearing is properly made to determine the extent of harm, when extrajudicial jury contacts occur. *Smith v. Phillips*, 455 U.S. 209 (1982).

Just last term Justice Marshall pointed out that "the only firm conclusion that can be drawn from our impartial-jury jurisprudence is that a prospective juror's *own* 'assurances that he is equal to the task cannot be dispositive of the accused's rights.'" *Mu'Min v. Virginia*, —— U.S. ——, 111 S. Ct. 1899, 1913 (1991) (Marshall, J., dissenting) (quoting *Murphy v. Florida*, 421 U.S. 794, 800 (1975)).

B. The Court Should Grant This Writ Because This Case Presents Circumstances Which Demonstrate That Due Process Requires a Presumption of Implied Bias, and the Evidence of Record Did Not Overcome That Presumption.

The Court has never decided squarely whether a conclusive presumption of implied bias should be used in appropriate circumstances. *See Smith v. Phillips*, 455 U.S. at 223 (O'Connor, J., concurring). The Petitioner maintains that the circumstances surrounding the military's "jury" system create the appropriate circumstance for the Court to decide this issue.

The Petitioner recognizes that military members do not enjoy the privileges of the Bill of Rights to the same extent as civilian members of American society. After all, the realities of military necessity and national security require that the military society be distinct from civilian life. *See Solorio v. United States*, 483 U.S. 435, 447-48, *reh'g denied*, 483 U.S. 1056 (1987) (citing cases implicating service members' constitutional rights).

However, the Court has never suggested that service members forfeit their right to a fundamentally fair trial by joining the military society. As George Washington said in response to the New York Provincial Congress' concern that he would become king, "[W]hen we assumed the soldier, we did not lay aside the citizen." *See* George Washington, in 2 THE WRITINGS OF GEORGE WASHINGTON 501 (Worthington C. Ford ed., 1889). The military justice system should provide the due process necessary to protect each service member's dignity as an American citizen.

The military justice system has been justifiably criticized by civilians. For example, Justice Douglas once wrote for the Court: "[C]ourts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law." *O'Callahan v. Parker*, 395 U.S. 258, 265 (1969), *overruled on other grounds by Solorio v.*

United States, 483 U.S. 435 (1986). Members of Congress have shared this concern for service members' rights. *See O'Callahan*, 395 U.S. at 266, n.7. With respect to the notion of a jury trial, this concern has been best explained, however, by distinguished military commentators. "The most unusual and distinct aspect of the contemporary court-martial is the nature and selection of the court members." Francis A. Gilligan and Frederic I. Lederer, COURT-MARTIAL PROCEDURE § 15-11.00 (1991) (hereinafter Court-Martial Procedure). Colonel Gilligan adds: "The most unique feature of Article 25 [10 U.S.C. § 825] is its insistence on the appointment of the court members by the convening authority—the officer whose responsibilities include clear prosecutorial duties." *Id.*

It is little wonder then, that an accused facing imprisonment for life views the process afforded him with justifiable skepticism. He sees the prosecutor and defense counsel wearing the same uniform, both seeking to curry favor with the commander who ordered his trial. He knows that, by statute, the same commander has handpicked each of the officers from his command, thus giving the prosecution an unlimited number of peremptory challenges.[5] When he learns that a key government witness has communed with the officers who will serve as jurors, who were selected by the convening authority, and the uniformed judge rules that they are "equal to the task based upon their own assurances," he must have little faith that they will judge the credibility of that government witness based only upon in-court testimony. A citizen can see little fairness in a system which gives the prosecutor's witness, whose credibility was bolstered by extensive contact with the jurors outside the courtroom, such a distinct advantage over the defense witnesses, whose credibility was measured solely by their testimony in court.

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[5] *See* Court-Martial Procedure, at § 15-31.00.

CONCLUSION

Because the trial judge limited consideration of the hearsay statements *only* to the state of mind of the *declarant* (Mrs. Elmore) they could not be considered by the fact finders for any other purpose, such as the *Petitioner's* means, motive, or opportunity. Therefore, admission of the alleged statements of Mrs. Elmore was reversible error, and the Courts of Military Appeals and Military Review erred by considering the evidence admissible to show marital discord.

This evidence dealt with alleged threats and acts of violence by the Petitioner. Without this inflammatory hearsay, the government would have had a severely weakened case. The hearsay must have had an unfair prejudicial impact on the jurors' deliberations such that a miscarriage of justice will occur if this conviction is not reversed. The Petitioner was denied the opportunity to cross-examine his accuser, and the evidence was introduced for a limited purpose only, not on the merits under a legally relevant recognized exception to the hearsay rule. Further, his substantial due process rights were violated because the testimony did not bear sufficient indicia of reliability. This evidence was highly prejudicial to the Petitioner and was admitted in conflict with the United States Constitution, *United States v. Brown*, *supra*, and the majority rule among the state courts of the country. Accordingly, the Court should grant this Petition for a Writ of Certiorari.

Moreover, the Court should grant the Petition to decide if the circumstances surrounding the contact between the key government witness and the jurors appropriately calls for a conclusion of implied bias, despite the hearing afforded the Petitioner at trial.

Respectfully submitted,

JACK B. ZIMMERMANN
Counsel of Record
ZIMMERMANN & LAVINE, P.C.
770 South Post Oak Lane
Suite 620
Houston, TX 77056
(713) 552-0300

JOSEPH B. GILBERT
Major, U.S. Marine Corps

NAVY-MARINE CORPS APPELLATE
REVIEW ACTIVITY
Washington Navy Yard
Building 111
Washington, D.C. 20374-1111
(202) 433-4161

February 1992

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

USMCA Dkt. No. 65524/NA
CMR Dkt. No. 88-4769

UNITED STATES,
Appellee

v.

CHARLES W. ELMORE, (252-19-7504),
Appellant

ORDER

On consideration of appellant's petition for reconsideration, it is, by the Court, this 12th day of November, 1991,

ORDERED:

That said petition is hereby denied.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Navy
Appellate Defense Counsel (ZIMMERMANN, Esq.)
Appellate Government Counsel (SPRANCE)

APPENDIX B

U.S. COURT OF MILITARY APPEALS

No. 65524
NMCM 88 4769

UNITED STATES,
Appellee,

v.

CHARLES W. ELMORE,
Boatswain's Mate Third Class, U.S. Navy,
Appellant.

Argued Aug. 1, 1991

Decided Sept. 30, 1991

For Appellant: *Jack B. Zimmermann, Esq.* (argued); *Captain Michael K. Schaller, USMC* (on brief).

For Appellee: *Lieutenant Timothy S. Susanin, JAGC, USNR* (argued); *Commander Thomas W. Osborne, JAGC, USN* (on brief); *Lieutenant William R. Sprance, JAGC, USNR.*

Opinion of the Court

COX, Judge:

Appellant stands convicted, contrary to his pleas, of a single specification of premeditated murder, in violation of Article 118, Uniform Code of Military Justice, 10

USC § 918.[1] We granted review of four issues.[2] We resolve all of them against appellant.

I

We first take up granted issue III, wherein appellant challenges the sufficiency of evidence of his guilt. Our review is limited to testing *legal* sufficiency, Art. 67(c), UCMJ, 10 USC § 867(c) (1989). As the Supreme Court has noted:

> Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution.

Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979) (footnote omitted).

Our standard then

> is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Id.

The Court of Military Review has set out the facts quite comprehensively, as follows:

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[1] The Charge was referred as noncapital. Appellant was sentenced to a dishonorable discharge, confinement for life, total forfeitures, and reduction to E-1. The convening authority approved the sentence, and the Court of Military Review affirmed. 31 MJ 678 (1990).

2

I

WERE APPELLANTS RIGHTS TO CONFRONTATION OF WITNESSES, DUE PROCESS OF LAW, AND A FAIR TRIAL VIOLATED WHEN A CRUCIAL PROSECUTION EXPERT WITNESS IMPROPERLY ENGAGED IN CONVERSATION AND DINED

Boatswain's Mate Third Class (BM3) Elmore was a member of the station boat crew at Naval Station Harold E. Holt, when he was convicted of murdering his wife, Bella, a Filipino, at Exmouth, Australia, during the early morning hours of 17 March 1988. Appellant and Bella had lived together for 3 years and had been married for 6 months in March 1988. At trial the evidence revealed that the appellant and his wife had constant arguments over money and a history of relatively minor mutual spousal abuse. The testimony included statements Bella made to her friends concerning her dissatisfaction with the marriage, maltreatment by appellant, threats by him to harm her, and fears for her personal safety comprising . . . hearsay statements objected to by the defense. . . . The testimony also included statements appellant had expressed to Michael and Stephanie Parsons, his best friends, that he wanted to divorce Bella, and that his marriage to her was a mistake.

WITH THE MEMBERS OF THE COURT THE FIRST NIGHT OF TRIAL AND ATE BREAKFAST WITH THEM THE SECOND DAY OF TRIAL?

II

WERE APPELLANT'S RIGHTS TO CONFRONTATION OF WITNESSES, DUE PROCESS OF LAW, AND A FAIR TRIAL VIOLATED WHEN THE MILITARY JUDGE ADMITTED HEARSAY EVIDENCE OF ORAL STATEMENTS PURPORTEDLY MADE BY THE ALLEGED VICTIM?

III

SHOULD THE FINDINGS OF GUILTY BE SET ASIDE BECAUSE THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUSTAIN FINDINGS OF GUILTY?

IV

WAS APPELLANTS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT VIOLATED WHEN HIS FOREIGN CIVILIAN DEFENSE COUNSEL FAILED TO OBJECT TO THE ADMISSION OF DAMAGING HEARSAY STATEMENTS AND SPECIFIC INSTANCES OF MISCONDUCT?

Parsons, on several different occasions, that he "wanted to cut Bella up and use her for shark bait." While drunk, he had "jokingly stated" to Michael The Parsons testified about a specific instance where appellant struck Bella, which caused a lump to raise on her head and blood to come from her mouth. Further, appellant and Bella had had a particularly vocal, crude, and public argument at the enlisted club on 4 March. Finally, a Chief Tope, who drove appellant home the night of the 4 March argument, testified that appellant was upset, cried, and stated that his marriage was over because Bella was off "f . . . someone else."

On the evening of 16 March, appellant and his wife, with their friends, bowled and then went to the enlisted club for drinks. After drinking heavily, appellant and Bella were seen to leave the club together. Appellant later told the police authorities that he and Bella had returned home around 2300. Appellant has told no less than four different stories as to what happened later that night. In version 1, which appellant told over the next two days to the Parsons, his division officer LT Sullivan, Petty Officer Smith, and Australian police authorities, he stated that he went to bed upon returning home and that Bella was gone when he awakened at 0530 the next morning, 17 March 1988. In version 2 appellant stated that he and his wife returned home that evening, argued heatedly over money, and decided to go for a drive to help resolve their differences. After stopping the car (the only white hatchback Ford Mustang in Western Australia) off-base, Bella got out of the car to walk. Appellant drove off leaving his wife but later picked her up. They then drove to the Navy pier, 10 miles from their house. Appallant stated that upon arriving at the pier between 0100 and 0130 they continued to argue. Appellant, agi-

tated, left Bella at the pier and returned home. Appellant stated that he next saw Bella later that morning while he and Parsons were driving to work, though he neither told Parsons of leaving Bella at the pier nor did he stop to pick her up. When Detective Sergeant Balchin questioned appellant concerning this version, appellant recanted and told version 3, that is, he and Bella entered the boathouse near the pier to get something to drink, continued to argue, whereupon appellant told her to take her belongings and leave their house. Bella the walked the nearly one-fourth of a mile length of the pier, headed to the northwest corner of the pier to a point where there was a gap in the rail. Appellant followed her and as he approached her, called to her and she either tripped or stumbled, and fell off or over the pier railing into the Gulf of Exmouth, where tides were running at 5-6 knots heading out toward the Indian Ocean and the water is 45 feet deep. He went home, went to bed, got up the next morning and went to PT formation. The 4th version is appellant's trial testimony, which embellishes the 3rd version. Appellant testified that after arriving at the boathouse, he and Bella returned to his car and drove several miles to the lighthouse, where they talked for 2 hours, then returned to the pier. He testified that after Bella fell into the water, he spent between 30 to 45 minutes searching the area around the pier and the catwalks beneath it. He also testified that the pier was well lighted at night, he never used the emergency phone on the end of the pier to call for assistance, admitted to never throwing a life buoy to assist her (because he states he never saw her), and not finding her, returned home, went to bed, awakened the next morning and went to work. He stated to Detective Sergeant Balchin, and testified, that he thought Bella could swim to shore and walk barefooted the 10 miles back to their house.

It was not until the following afternoon that appellant began to search for Bella, going first to the Parsons' home, and then to several other of Bella's friends' houses, asking if they had seen her because when he had wakened that morning he found she was gone. (Appellant explained that he made inquiries about her disappearance with her friends because Bella had previously spent the night at the houses of friends when she and appellant were not getting along.) From 18-27 March, appellant denied knowledge of Bella's whereabouts, and participated in searches for her in the area surrounding his house. On 19 March, while various people were searching the areas immediately adjacent to his house, he borrowed the 4-wheel drive vehicle of UT2 Kanachki and drove to the beach area, looking for Bella. He took no one with him and told no one what he was going to do. It was not until questioned by Detective Sergeant Balchin on 27 March that he recanted his original story (version 1) concerning Bella's disappearance.

The evidence of record reveals that as of the date of trial Bella Elmore had no been seen by appellant or their friends since the evening of 16 March 1988. No body or traces thereof had been found. Also proven was the fact that Bella had not been listed as a passenger on the passenger manifests of the Australian bus company or airlines, nor at the Military Airlift Command terminal. Although an identification card is not required for domestic transportation, employees of the bus and airline terminals testified they did not remember seeing her or anyone resembling her after 16 March. Finally, the victim's military dependent identification card and resident alien card were found in the Elmore home and appellant gave the police her passport.

31 MJ 678, 681-83 (1990).

In addition, the court noted that

> Shorts identified by Bella's best friend as belonging to Bella were found at the beach near the pier. A bedspread identified as one similar to one owned by the Elmore's was also found at the beach near the pier. Appellant's car was seen heading off-base, toward the pier after 0330 of the morning in question. Testimony from a fellow diver was that no one could have swum to the beach in those currents from the end of the pier that night.[3] Appellant's auto and house were both cleaned thoroughly immediately after Bella's disappearance, which was unusual as testimony was that both were generally a mess. Further, all of Bella's identification, including passport, military dependent identification card, working permits and the rest of her clothes and jewelry, were found in the Elmore home during a permissive search.

31 MJ at 684.

Further, the court recited:

> Bella's blood type was A positive. This type of blood was found on the sheets and mattress pad at their house, and the Government's expert testimony, hotly disputed by the defense expert, was that this blood was venous or peripheral blood, and not menstrual blood, as its position and pattern on the sheets and mattress pad would indicate. [*See infra.*] It also was present on a knife used for the cleaning and cutting of fish owned by appellant. A pair of stained blue shorts washed up on the beach within days of Bella's disappearance, were positively identified by two of Bella's friends as hers, but had been washed by their finder, so no blood-type identification of the

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[3] Appellant was also a diver and knowledgeable of the water conditions.

> stains was possible.[4] The bedspread, washed up on the beach approximately 6 kilometers from the pier about a month later and identified by Maria Pryor as belonging to the Elmore's, had been saturated with blood, notwithstanding that any conclusive analysis as to the type or "humanness" of the blood was possible [sic] due to its exposure to the elements.

Id. at 684.

The Government's theory of the case was that appellant murdered Bella by stabbing her with his fishing knife, wrapping her body up in the bedspread, and driving to the pier, where he tossed her body into the shark-infested waters. On the foregoing facts, the court members found appellant guilty, beyond a reasonable doubt, of the premeditated murder of his wife. The Court of Military Review, exercising its independent factual and legal review powers, Art. 66(c), UCMJ, 10 USC § 866 (c), declared itself

> legally and factually convinced beyond any reasonable doubt that the appellant murdered his wife, Bella Elmore, and is guilty of the offense of which he was convicted.

31 MJ at 685.

Article 118(1) of the Uniform Code denounces premeditated murder in these terms:

> Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he . . . has a premeditated design to kill[,] . . . is guilty of murder. . . .

The Manual for Courts-Martial, United States, 1984, further identifies these elements of premeditated murder:

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[4] The finder did not realize the possible connection to the offense until after the shorts had been washed.

(a) That a certain named or described person is dead;

(b) That the death resulted from the act or omission of the accused;

(c) That the killing was unlawful; and

(d) That, at the time of the killing, the accused had a premeditated design to kill.

Para. 43b(1), Part IV.

Certainly there is no requirement that the prosecution produce a body, especially when it appears that the accused has gone to such lengths to make that physically impossible. Like the court below, we are persuaded by the overwhelming circumstantial evidence that "*any* rational trier of fact [w]ould have found the essential elements of the crime beyond a reasonable doubt." *See Jackson v. Virginia*, 443 U.S. at 319, 99 S.Ct. at 2789. Under this standard, the evidence of record is legally sufficient to sustain the findings of guilt in this case.

II

Next, we take up granted issue I, which concerns the alleged "bolstering of the key government witness by his out-of-court contact with the members." The witness was David F. Werner, a forensic serologist who worked at the U.S. Army Criminal Investigation Laboratory, Fort Gillem, Georgia. Werner tested numerous items submitted by the Government for the presence and type of blood. He was one of three experts who testified at the court-martial concerning blood.

In order to avoid exposure of the membership to pretrial publicity, all members had been brought in from remote commands. Because Exmouth was a small town with limited public accommodations, it happened that Werner and the court members were all billeted at the

same hotel. Again, we defer on the facts to the following summary by the Court of Military Review:

> Mr. Werner, the Government expert witness who testified at trial concerning the presence and type of blood stains on various items, had dinner with the members of the panel the right of 25 July. That date was the first day of trial with the court assembled. The members, when *voir dired* individually on the communications, were not as one with their answers, but when taken in the light most favorable to appellant, stated that Mr. Werner told them he was a witness at the court-martial, that he was a CID agent who worked at the Army Crime Laboratory in Atlanta, had worked with the FBI on various cases, and testified at other courts-martial. These were not the exclusive topics of conversation, of course; but they were the topics that had any relevance for potentially prejudicing the appellant's case. To compound matters, Mr. Werner breakfasted with three of the members the next morning. Mr. Werner explained the next day that he sat with the members at dinner because the restaurant did not allow patrons to occupy a table by themselves. Mr. Werner testified that he did not realize he was dining with members, and they did not discuss the case. He also testified that he could not have said he worked with the FBI because he never had; but he might have made a comment to the effect that he had gone to school at the FBI Academy.

31 MJ at 688-89.

These contacts were reported to trial counsel shortly before *voir dire* of the members was to commence, and the matter was promptly reported to the military judge. The subject of these contacts, therefore, became a primary focus of individual *voir dire*. It quickly became clear from *voir dire*, however, that no information re-

garding the case was in any way mentioned to members. The defense contention then and now is that, due to this informal contact, the members would tend to give more credence to Werner's testimony than they might otherwise have.

In this regard, defense counsel asked each of the members about his general impression of the witness as a person. Not surprisingly, based on these limited contacts, no strong impressions seemed to have emerged. One member said:

> I guess my general impression was that he seemed to be just a rather negative individual, complaining about accommodations, travel, that sort of thing. But other than that, I had no impression of him.

Another member offered that "[h]e seemed [like a] relatively nice guy." According to another member:

> Well, he seemed friendly. He didn't volunteer any information about what he did and, in fact, I hadn't —when I sat down, I really didn't know what he—what his connection with the case was, as a witness or—I thought perhaps he was one of the counsel. . . .
>
> Another member described him as just an average individual. I didn't judge his intelligence or anything like that and we didn't talk about anything that would give you anything that would—like I said, all we were discussing were current events in the States.

Two other members had so little contact with Werner that they had no impression whatever.

The final member, Lieutenant Commander Griffin, when asked by defense counsel for his "general impressions of the man [Werner] . . . . [i]n terms of personality, intelligence level, anything like that[,]" responded:

> Well, I don't know. . . . He seemed to be competent in his job. I don't know. He didn't—

To clarify that response, the military judge personally quizzed the member as follows:

> Q. All right. Lieutenant Commander Griffin, what if anything did the witness tell you that would lead you to believe that he was competent in his job?
>
> A. Only the number of cases that he indicated he had worked on and that he had apparently had been with the—at one point he did indicate that he had worked with the FBI on various cases and so forth.
>
> Q. And from the fact that he had participated in several cases you deduced that he must be competent otherwise he wouldn't have participated in several cases?
>
> A. Yes.
>
> Q. Was there anything other than that that would lead you to draw any conclusions as to his competency or credibility?
>
> A. No.

At the conclusion of *voir dire*, the defense challenged the array for cause based on the contact with Werner. The military judge denied the challenge with this rationale:

> The challenge for cause of the array of the court members is denied. This Court could care less about the cost [of bringing in new members for the court-martial]. In fact, Lieutenant Blood [defense counsel], I want to ensure this case is only tried once. If there was any question, *any* question in my mind, I would rule to the contrary and I would rule the same if this case was tried in Pearl Harbor or if it's tried here.
>
> It is often the case in courts-martial practice to have court members analyzing the testimony of people they know; people in the crew; people in the company. There are many cases where everyone

> knows everyone else, and even under those circumstances, there is no challenge for cause to the array unless there is some bias or prejudice or indicia of the prejudice. In this case, I am satisfied beyond any doubt that there has been no discussion of any issues relevant to this case. The one hour casual dinner conversation, in my judgment, just does not suffice to establish some kind of potential for prejudice.

Thereafter, the defense challenged one member (Lieutenant Anderson) for cause on the ground that he had been a civilian police officer prior to entering active duty in the Navy. The military judge, though satisfied that the lieutenant would have made "an excellent court member," excused him on the basis that "[c]hallenges for cause should be liberally granted. . . ." No other members were challenged for cause. The defense next challenged Lieutenant Commander Griffin peremptorily. The court-martial proceeded with the remaining five members.

Both parties and the Court of Military Review agree that the standards to be applied here are those we adopted in *United States v. Adamiak*, 4 USCMA 412, 15 CMR 412 (1954). There we observed:

> [T]he Supreme Court long ago proclaimed that "Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least until their harmlessness is made to appear." *Mattox v. United States*, 146 U.S. 140 [13 S.Ct. 50, 36 L.Ed. 917 (1982).] As later cases make clear, in the Federal courts the presumption of prejudice arising from communications between jurors and a witness or other party is a rebuttable one; "but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." Ultimately the trial

> judge determines whether the Government has rebutted the presumption of prejudice. The presumption must be rebutted by a "clear and positive showing" that the improper communication from a third person or witness did not and could not operate in any way to influence the decision. *Cf. Baker v. Hudspeth*, 129 F.2d 779 (CA 10th Cir).

4 USCMA at 417-18, 15 CMR at 417-18 (some citations omitted).

We agree that this remains the standard. We also agree that the prompt and thorough investigation superintended by the military judge clearly established that the inadvertent contact between the witness and the court members did not in fact prejudice appellant or taint the proceedings in any way, appearances notwithstanding. We are confident that the court members were able to evaluate the testimony and opinions of the witness, Werner, without bias or predisposition. No one can ask for more. *Cf. Mu'Min v. Virginia* —— U.S. ——, 111 S.Ct. 1899, 114 L.Ed.2d 493 (1991).

III

Finally, we consider the remaining two issues in tandem. These concern admissibility of evidence of 12 specific statements or assertions by Mrs. Elmore, and defense counsel's failure to object to their admission.

In limine, defense counsel moved to suppress evidence of numerous statements allegedly made by Mrs. Elmore to her friends. The judge suppressed evidence of some of these statements. However, in view of the numerous theories of relevance which could potentially emerge on the merits, the judge declined, *in limine*, to suppress 10 of these statements.[5] Essentially, these statements break

[5] Appellate defense counsel have subsequently identified two more statements received at trial that they argue should have been suppressed.

down into three groups: that the victim was frightened of appellant and, in particular, frightened that he might kill her; that appellant had threatened to kill her in the past; and that he had physically abused her in various ways and even tried to kill her. *See* Appendix. While declining to suppress, the judge invited the defense to renew their objection on the merits if the Government attempted to introduce the statements, so he could rule with the benefit of a more specific context.

On the merits, the evidence pertinent to this question unfolded in this manner: First, the prosecution introduced appellant's extensive pretrial statements to Australian investigators, wherein he repeatedly characterized his relationship with Bella as harmonious. Then the Government produced witnesses who had personally observed that the Elmores' relationship was often volatile and acrimonious, witnesses who had seen the couples' abusiveness toward each other, both verbal and physical, and who knew that both appellant and the victim had expressesd the desire to divorce. Specifically, these witnesses had heard appellant make threats against Bella's life and had seen examples of his violence toward her.

During cross-examination by the defense, one of these witnesses was asked nevertheless to "describe their [the Elmores'] degree of affection toward each other compared to other people." The witness responded, "Well, their affection toward each other was a lot better than me and my husband's." [6]

After this witness was excused, trial counsel, in a session under Article 39(a), UCMJ, 10 USC § 839(a), signaled his intention to introduce the statements by Bella which had been the subject of the *in limine* motion. At this time, the military judge ruled—*and the defense agreed*—that the statements were admissible, not for the

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[6] Other government witnesses, on cross-examination by the defense, rated the marital relationship as normal.

truth of the matters asserted, but to show the victim's state of mind, *i.e.* her fear of appellant, and to rebut the implication that the relationship was harmonious.

Accordingly, prior to presenting the witnesses who were to relate these statements, the military judge gave this on-the-spot instruction:

> Gentlemen, we're reaching the point in trial where you're going to be hearing numerous statements made by—or allegedly made by Bella Elmore to her friends regarding prior acts of violence to her. You are to consider this evidence for the limited purpose of establishing what her state of mind was—whether or not she feared the accused and as it went to their marital status. You may not consider the evidence for any other purpose and you may not conclude from the evidence that the accused is a bad person or has criminal tendencies and that, therefore, he committed the offense charged. Does each member of the court understand that instruction and how you are to consider this testimony?

The defense did not object to the instruction; and the witnesses then testified about the statements, *inter alia*.

The colloquy between the judge and counsel makes clear that it was not envisioned that the statements would be used by the members for the truth of the matters asserted. Rather, the following scenario seems to represent the understanding of the judge and the parties: One of appellant's versions had Bella simply falling off the pier as appellant approached. If believed, the factfinder would need to decide whether the fall was an accident, a suicide, an act of panic caused by appellant's ferocious approach, or had some other explanation. Thus, the victim's fear of appellant, if shown, was potentially relevant.

Additionally, it was agreed that, since the suggestion that the marital relationship was at least outwardly harmonious came from appellant's own mouth and from de-

fense cross-examination of government witnesses (thus suggesting appellant was unlikely to have killed her), the *fact* that the victim was going around saying these awful things about appellant would, if believed, rebut the claim of a harmonious relationship.[7] For these reasons, the military judge ruled the statements admissible; and on these bases, the defense did not object.[8]

Before proceeding, it is useful to examine the apparent defense theory of the case. As indicated, the defense sought to portray the relationship as at least a tolerable one. Nevertheless, the defense was quite in agreement that both parties, at times, wanted to end the relationship. In part, the theory was that the Government had not proven that Bella Elmore is dead. Indeed, the defense produced two witnesse who said they had seen a woman resembling Bella Elmore, alive and well, after her supposed disappearance. Additionally, in one of appellant's versions of the events, he claimed seeing Bella the morning after she "fell" as he drove to work. Therefore, part of the defense strategy was to suggest that Mrs. Elmore somehow survived the night in question and simply ran away. In support of this theory, the defense itself elicited some of the testimony regarding the victim's genuine fear and dislike of appellant due to his abuse and mistreatment, resulting in her apparent determination to get away from him.

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[7] In this posture, there is no confrontation problem. *See* U.S. Const. amend. VI. The event underlying the testimony was the fact of the victim's saying what she was saying; the witnesses to the event were present in court and testified as to their observations.

[8] Although the judge, in his instructions, limited the use of the victim's statements to showing "state of mind," "fear," and "as it went to their marital status," *and "for . . . [no] other purpose"* (*see* text *supra*; emphasis added). it would have been better if he had gone on to emphasize that the statements specifically were not to be considered for the truth of the matter asserted. In view of the totality of the instructions given, however, we are satisfied that the court members understood how to use the evidence. In the absence of timely defense objection, the instructions were sufficient.

On appeal, the Court of Military Review concluded that the victim's statements were admissible. The court did not rely on the state-of-mind/fear rationale but, instead, found that the statements

> tend[ed] to rebut the description of the state of appellant's marriage as testified to by Bella's friend upon cross-examination by civilian defense counsel, who thus opened the door and acknowledged that the door was opened.

31 MJ at 686. In addition, the court held that the defense waived any objection it might have had to admission of the evidence by its ultimate failure to object, Mil.R.Evid. 103(a)(1), Manual, *supra*; and even if it "was error" to admit the statements, "the error was harmless." *Id.* at 686 and 687.

Initially, we look to Mil.R.Evid 803(3)—"*Then existing mental, emotional, or physical condition.*" This provision states:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * * *
>
> A statement of the *declarant's then existing state of mind, emotion, sensation, or physical condition* (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(Emphasis added).

It is immediately clear from Mil.R.Evid. 803(3) that only a few of Mrs. Elmore's statements could have been received as hearsay exceptions under this rule, namely those statements reciting her fear of appellant. The other statements, those reciting his prior threats and assaults, are specifically not included under this exception. However, even those statements were offered only to show

the victim's fear and for the *fact* of her uttering them. They were not "offered in evidence to prove the truth of the matter asserted"; thus, they were not hearsay. Mil.R.Evid. 801(c).

Inasmuch as the Court of Military Review did not embrace the state-of-mind relevance theory but, instead, grounded its holding on rebuttal of the harmonious-marriage claim, we also limit our review to the adequacy of that theory. The defense, of course, never asserted the victim's fear-of-appellant-at-the-end-of-the-pier as some sort of defense, and the prosecution's theory was that appellant drove the already-dead victim to the pier in the first place. Notwithstanding our self-imposed limitation, we agree that a military judge is not strictly limited to the theories advanced by the parties, but must instruct the court members on the legal points reasonably raised by the evidence. *E.g., United States v. Westmoreland*, 31 MJ 160 (CMA 1990), *cert. denied*, —— U.S. ——, 111 S.Ct. 966, 112 L.Ed.2d 1053 (1991). Furthermore, we recognize that, at the time of his ruling here, the military judge could not fairly be charged with omniscience in knowing exactly which theories would ultimately be pressed by the parties.

Appellant cites the case of *United States v. Brown*, 490 F.2d 758 (D.C.Cir.1973), as dispositive precedent. *Brown* was concerned with statements of the murder victim that he feared the accused would kill him. The Court of Appeals established specific limitations under which such statements could be received in evidence over defense objection. *Id.* at 773-74. In principle, we have no disagreement with *Brown*; but like the Court of Military Review, we conclude that *Brown* is inapplicable to our analysis because we do not review that alternate theory of admissibility.

That brings us to the Rules under which these statements must have been admitted *vel non*. Mil.R.Evid. 401 provides:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Mil.R.Evid 402 provides that "[a]ll relevant evidence is admissible," with certain exceptions.

In one respect, we read the record of trial slightly differently from the military judge or the Court of Military Review. In our view, the status of appellant's marriage was in issue from the outset. The prosecution in its case-in-chief introduced considerable evidence from witnesses who personally observed appellant's abuse of, and contempt for, the victim. Clearly, this was received for the purpose of showing appellant's motive, intent, premeditation, etc., and the military judge so instructed the members. Mil.R.Evid. 404(b). Obviously, the Government did not set out to demonstrate the wretched state of the marriage for its own sake, but in the course of establishing motive, intent, premeditation, etc., the status of the marriage inevitably came sharply into focus.

The defense cross-examination appears to be more of damage control. It sought to elicit testimony that the marriage was not entirely in shambles, but still retained a degree of affection—and certainly the marital condition was no incentive to murder. It was this that the Government was permitted to rebut. RCM 913(c)(1)(C). In our view, therefore, both parties thrust the state of this marriage into issue. Further, we agree that the mere fact that the victim was going about making all these terrible accusations against appellant, if believed, tended to rebut the relatively-harmonious-marriage stance taken by the defense. *Cf. Lock v. State*, 567 N.E.2d 1155 (Ind.1991). Thus, we agree that the government rebuttal evidence was relevant.

Even if relevant, of course, evidence is to be excluded if its probative value is substantially out-weighed by the

danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Mil.R.Evid. 403.

However, the defense ultimately did not object to admission of the evidence on the bases proffered; and it appears that the military judge did not, at least expressly on the record, undertake the Mil.R.Evid. 403 balancing. Given the quantum of testimony received in evidence that was substantially similar to the victim's statements, it is difficult for us to conceive both (a) that her statements were so unduly prejudicial as to substantially outweigh their probativeness, and (b) that it was plain error for the judge to not, *sua sponte*, exclude them. In sum we conclude that the judge did not err in receiving the statements.

This brings us, at length, to the question of the adequacy of counsel's representation. In essence, appellant complains that trial defense counsel failed to object to testimony relating to appellant's uncharged misconduct, and counsel failed ultimately to object to admission of the just-considered statements of the victim. Regarding the uncharged misconduct, insofar as we can determine, this evidence was properly admissible for the reasons indicated by the military judge, and the judge's limiting instructions in this regard seem beyond reproach. Regarding the victim's statements, we have already held that they were relevant for the limited purpose offered and that undue prejudicial impact is not apparent.

Regarding defense counsel's apparent strategy, we make a few more observations in light of the claim of inadequate representation. Literally, the complaint alleges that counsel *failed to object* to admission of the statements, and he even conceded that the "door was open." We agree that the door was open, so counsel's failure to object could not be a basis of inadequacy, as objecting at that point would not have been successful.

In addition, as indicated, it does not appear to us that the defense opened the door to the status of the marriage or to inferences to be drawn therefrom. By the time defense counsel got a shot at the winesses, that was old news.

Our review of the case shows that counsel had a horrible set of facts to contend with. Through appellant's successive recantations and admissions, he had established one of the most remarkable examples of consciousness of guilt this Court has ever seen. Further, on his own, appellant had established a motive, an opportunity, and the capability of committing the offense; he placed himself at the scene of the crime; he certified himself as a liar; he tendered an implausible, transparent, and self-serving claim of innocence; and he highlighted his destruction and concealment of evidence and his deliberate misdirection of the search for his wife. Coupled with the physical evidence that escaped appellant's cleanup measures and the third-party witnesses, counsel faced a daunting challenge.

Indeed, it would seem appellant left counsel few real options. Counsel can hardly be faulted for choosing to cling to appellant's last iteration that the victim fell off the pier, but not at appellant's hands. Counsel could proceed on this theory in one of two manners. He could accept the Government's portrayal of appellant as an uncaring brute with a powerful urge to terminate his wife's life, as was inferable from the government's witnesses' testimony; or counsel could attempt to undercut this showing by eliciting testimony that there was some tenderness left in the marriage, such that appellant would not have tried to kill his wife. Logically, the defense chose to attempt the latter.

If choosing this tack triggered admission of the victim's statements, counsel can hardly be faulted. In any event, the statements were largely redundant of other evidence already in the record, and they do not appear to have

been incrementally very damaging. In addition, the fact that the victim was going about saying these things actually supported the defense theory that she had finally seized the opportunity to make her escape from appellant. That the strategy did not succeed is not the test of adequacy of representation. Nothing in this record suggests that counsel was deficient in seeking to humanize appellant. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

Chief Judge SULLIVAN and Senior Judge EVERETT concur.

APPENDIX

(1) [S]he told me that she was scared of [appellant].

(2) I told her to leave and she said she can't because she knows that [appellant's] going to follow her and he's frightened her that he's gonna kill her.

(3) One day she come to my house and she told me that [appellent] tried to push her off the boat.

(4) [S]he told me that [appellant]—she was in the bedroom and [appellant] came in and he grab a pillow he push her at the bed and he put that on her face.

(5) And she said that when she went out to the door, [appellant] grab her at the hair and she fell down and she said . . . [appellant] told her if she leave, he's going to kill her.

(6) She told me that [appellant] always frighten her.

(7) One day she told me that they went fishing one day and [appellant] has a knife and he's doing something and Bella ask her if the knife was sharp and [appellant] said, "Yeah. Let me try this on you." He said, "You want me to try this on you?"

(8) [S]he said that she believed that her husband is going to kill her.

(9) I said, "I only have $10 Australian" and I asked her what's she's going to do with the money and she said she wants to come to my house. And I ask her where she at. She said, "I'm on base right now." And I ask her what's wrong and she said that she has a fight with [appellant] and he—she said that [appellant] tried to choke her.

(10) She told me one time that [appellant] almost killed her.

(11) She told me that [appellant] tried to kill her.

(12) She told me that [appellant] tried to choke her.

APPENDIX C

U.S. NAVY-MARINE CORPS COURT OF MILITARY REVIEW

NMCM 88 4769

UNITED STATES

v.

CHARLES W. ELMORE, 252 19 7604,
Boatswain's Mate Third Class
(E-4), U.S. Navy

Sentence Adjudged 6 Aug. 1988

Decided 1 Aug. 1990

Jack B. Zimmermann, Esq., Civilian Defense Counsel.

Capt. M.K. Schaller, USMCR, Appellate Defense Counsel.

LT J.L. Staley, JAGC, USNR, Appellate Defense Counsel.

LT William R. Sprance, JAGC, USNR, Appellate Government Counsel.

Before ALBERTSON, WILLEVER and JONES, J.J.

ALBERTSON, Senior Judge:

Contrary to his pleas, appellant was convicted by general court-martial composed of officer members of premeditated murder in violation of Article 118, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 918. He was sentenced to life imprisonment, total forfeiture of pay and allowances, reduction to pay-grade E-1, and a dishonorable discharge. The convening authority approved the sentence adjudged.

Before this Court, appellant asserts eight assignments of error:

I. THE FINDINGS OF GUILTY SHOULD BE SET ASIDE BECAUSE THE EVIDENCE IS INSUFFICIENT TO CONVINCE THIS HONORABLE COURT AS A FACT FINDER OF GUILT BEYOND A REASONABLE DOUBT.

II. THE FINDINGS OF GUILTY SHOULD BE SET ASIDE BECAUSE THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUSTAIN FINDINGS OF GUILTY.

III. APPELLANT'S RIGHTS TO CONFRONTATION OF WITNESSES, DUE PROCESS OF LAW, AND A FAIR TRIAL WERE VIOLATED WHEN THE MILITARY JUDGE ERRONEOUSLY ADMITTED HEARSAY EVIDENCE OF ORAL STATEMENTS PURPORTEDLY MADE BY THE ALLEGED VICTIM.

IV. APPELLANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT WAS VIOLATED BECAUSE HIS FOREIGN CIVILIAN DEFENSE COUNSEL FAILED TO OBJECT TO THE ADMISSION OF DAMAGING HEARSAY STATEMENTS AND SPECIFIC INSTANCES OF MISCONDUCT WHICH WERE PREJUDICIAL AND IRRELEVANT.

V. THE FINDINGS OF GUILTY SHOULD BE SET ASIDE BECAUSE THE MEMBERS WERE IMPROPERLY INFORMED THAT THE APPELLANT HAD INVOKED HIS FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION DURING CUSTODIAL INTERROGATION.

VI. THE APPELLANT'S RIGHTS TO CONFRONTATION OF WITNESSES, DUE PROCESS OF LAW, AND A FAIR TRIAL WERE VIOLATED

WHEN A CRUCIAL PROSECUTION EXPERT WITNESS ENGAGED IN CONVERSATION AND DINED WITH THE MEMBERS OF THE COURT THE FIRST NIGHT OF TRIAL AND ATE BREAKFAST WITH THEM THE SECOND DAY OF TRIAL.

VII. THE FINDINGS OF GUILTY SHOULD BE SET ASIDE BECAUSE THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF THE APPELLANT BY ERRONEOUSLY INSTRUCTING THE MEMBERS ON THE ELEMENTS OF ATTEMPTED MURDER.

VIII. THE APPELLANT'S RIGHTS TO DUE PROCESS OF LAW AND PRETRIAL DISCOVERY UNDER THE UCMJ WERE VIOLATED BY THE PROSECUTOR'S SUPPRESSION OF IMPEACHMENT EVIDENCE.

He also petitions for a new trial. The basis for the petition is post-trial discovered evidence. In support of his petition, appellant submitted an affidavit of an Australian farmer swearing that he had seen a woman he believed to be the murder victim in Perth on 23 March, seven days after her alleged death at the hands of appellant. At trial Sarkis Yazmadjiam, an itinerant, claimed that he saw the victim on the same day, 23 March, in the same city, Perth, at about the same location, a street near the train station. Appellant contends that this newly discovered testimony, coupled with that of Mr. Yazmadjiam, would have produced a substantially more favorable result given the Government's lack of proof of *corpus delicti*, and its completely circumstantial case founded upon inadmissible hearsay. We reject appellant's assignments of error and deny his petition for new trial. Our reasons are set forth below.

BACKGROUND

Boatswain's Mate Third Class (BM3) Elmore was a member of the station boat crew at Naval Station Harold

E. Holt, when he was convicted of murdering his wife, Bella, a Filipino, at Exmouth, Australia, during the early morning hours of 17 March 1988. Appellant and Bella had lived together for 3 years and had been married for 6 months in March 1988. At trial the evidence revealed that the appellant and his wife had constant arguments over money and a history of relatively minor mutual spousal abuse. The testimony included statements Bella made to her friends concerning her dissatisfaction with the marriage, maltreatment by appellant, threats by him to harm her, and fears for her personal safety comprising those hearsay statements objected to by the defense in assignments of error III and IV. The testimony also included statements appellant had expressed to Michael and Stephanie Parsons, his best friends, that he wanted to divorce Bella, and that his marriage to her was a mistake. While drunk, he had "jokingly" stated to Michael Parsons, on several different occasions, that he "wanted to cut Bella up and use her for shark bait." The Parsons testified about a specific instance where appellant struck Bella, which caused a lump to raise on her head and blood to come from her mouth. Further, appellant and Bella had had a particularly vocal, crude, and public argument at the enlisted club on 4 March. Finally, a Chief Tope, who drove appellant home the night of the 4 March argument, testified that appellant was upset, cried, and stated that his marriage was over because Bella was off "f . . . someone else."

On the evening of 16 March, appellant and his wife, with their friends, bowled and then went to the enlisted club for drinks. After drinking heavily, appellant and Bella were seen to leave the club together. Appellant later told the police authorities that he and Bella had returned home around 2300. Appellant has told no less than four different stories as to what happened later that night. In version 1, which appellant told over the next two days to the Parsons, his division officer LT Sullivan, Petty Officer Smith, and Australian police authorities, he

stated that he went to bed upon returning home and that Bella was gone when he awakened at 0530 the next morning, 17 March 1988. In version 2 appellant stated that he and his wife returned home that evening, argued heatedly over money, and decided to go for a drive to help resolve their difference. After stopping the car (the only white hatchback Ford Mustang in Western Australia) off-base, Bella got out of the car to walk. Appellant drove off leaving his wife but later picked her up. They then drove to the Navy pier, 10 miles from their house. Appellant stated that upon ariving at the pier between 0100 and 0130 they continued to argue. Appellant, agitated, left Bella at the pier and returned home. Appellant stated that he next saw Bella later that morning while he and Parsons were driving to work, though he neither told Parsons of leaving Bella at the pier nor did he stop to pick her up. When Detective Sergeant Balchin questioned appellant concerning this version, appellant recanted and told version 3, that is, he and Bella entered the boathouse near the pier to get something to drink, continued to argue, whereupon appellant told her to take her belongings and leave their house. Bella then walked the nearly one-fourth of a mile length of the pier, headed to the northwest corner of the pier to a point where there was a gap in the rail. Appellant followed her and as he approached her, called to her and she either tripped or stumbled, and fell off or over the pier railing into the Gulf of Exmouth, where tides were running at 5-6 knots heading out toward the Indian Ocean and the water is 45 feet deep. He went home, went to bed, got up the next morning and went to PT formation. The 4th version is appellant's trial testimony, which embellishes the 3rd version. Appellant testified that after arriving at the boathouse, he and Bella returned to his car and drove several miles to the lighthouse, where they talked for 2 hours, then returned to the pier. He testified that after Bella fell into the water, he spent between 30 to 45 minutes searching the area around the pier and the catwalks

beneath it. He also testified that the pier was well lighted at night, he never used the emergency phone on the end of the pier to call for assistance, admitted to never throwing a life buoy to assist her (because he states he never saw her), and not finding her, returned home, went to bed, awakened the next morning and went to work. He stated to Detective Sergeant Balchin, and testified, that he thought Bella could swim to shore and walk barefooted the 10 miles back to their house.

It was not until the following afternoon that appellant began to search for Bella, going first to the Parsons' home, and then to several other of Bella's friends' houses, asking if they had seen her because when he had wakened that morning he found she was gone. (Appellant explained that he made inquiries about her disappearance with her friends because Bella had previously spent the night at the houses of friends when she and appellant were not getting along.) From 18-27 March, appellant denied knowledge of Bella's whereabouts, and participated in searches for her in the area surrounding his house. On 19 March, while various people were searching the areas immediately adjacent to his house, he borrowed the 4-wheel drive vehicle of UT2 Kanachki and drove to the beach area, looking for Bella. He took no one with him and told no one what he was going to do. It was not until questioned by Detective Sergeant Balchin on 27 March that he recanted his original story (version 1) concerning Bella's disappearance.

The evidence of record reveals that as of the date of trial Bella Elmore had not been seen by appellant or their friends since the evening of March 1988. No body or traces thereof had been found. Also proven was the fact that Bella had not been listed as a passenger on the passenger manifests of the Australian bus company or airlines, nor at the Military Airlift Command terminal. Although an identification card is not required for domestic transportation, employees of the bus and airline termi-

nals testified they did not remember seeing her or anyone resembling her after 16 March. Finally, the victim's military dependent identification card and resident alien card were found in the Elmore home and appellant gave the police her passport.

We will address the assignment dealing with legal sufficiency of the evidence first because only after finding legal sufficiency, must we determine factual sufficiency, *i.e.*, are we convinced beyond a reasonable doubt of appellant's guilt. *See United States v. Turner*, 25 M.J. 324 (C.M.A.1987); Article 66(c), UCMJ, 10 U.S.C. § 866(c). "The test for [legal sufficiency] is whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner*, 25 M.J. at 324 (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 569 (1979)). Appellant claimed rather succinctly in oral argument before us that he was convicted solely because he was a liar. We must admit that such a claim has given us pause because we like other courts are committed to the doctrine that

> a defendant may not be convicted on conjectures, however shrew, on suspicions, however justified, on probabilities, however strong, but only upon evidence which establishes guilt beyond reasonable doubt; that is, upon proof such as to logically compel the conviction that the charge is true. (Citations omitted).

State v. Riggs, 61 Mont. 25, 201 P. 272, 280 (1921). That pause, however, has in turn given us the time and opportunity to digest the few recorded cases addressing murder convictions based entirely on circumstantial evidence, most particularly those involving proof of *corpus delicti* and the significance of a defendant's inconsistent or contradictory statements, admissions or confessions, that served as the only direct evidence presented by the prosecution to prove its case against the defendant.

In a murder prosecution where there is no body or traces of a body, the Government must establish the *corpus delicti*, which consists of evidence proving two elements: that the alleged victim is dead and that the death was the result of some criminal agency. *United States v. Crider*, 45 C.M.R. 815 (NMCMR 1972). Production of a body or parts of a body is not required, *United States v. Williams*, 28 Fed.Cas. 636, 642 (1858); *Rex v. Hindmarsh*, 2 Leach 569, 168 Eng.Rep. 387 (1792); nor is it necessary that the evidence proving the *corpus delicti* connect the accused to the death of the victim. *People v. Cullen*, 37 Cal.2d 614, 234 P.2d 1 (1951); *Riggs*, 201 P. at 272. *Corpus delicti* is sufficiently proven when a *prima facie* case has been established. *State v. Lung*, 70 Wash.2d 365, 423 P.2d 72, 76 (1967). The *corpus delicti* can be proved by circumstantial evidence. *People v. Scott*, 176 Cal.App.2d 458, 1 Cal. Rptr. 600, 619 (1959); *Williams*, 28 Fed.Cas. at 643.

Once the *corpus delicti* has been proven, the fact finder may consider extrajudicial statements, admissions, and confessions of an accused to determine whether the Government has proven all of the elements of the crime alleged. *People v. Duncan*, 51 Cal.2d 523, 334 P.2d 858 (1979). Proof of the *corpus delicti* must exist independently of an accused's extrajudicial statements, admissions and confessions before the court may convict based on an accused's statements; in other words, an accused may not be convicted solely on the basis of his extrajudicial statements, admissions and confessions. *Cullen*, 234 P.2d at 7; *People v. Hiser*, 267 Cal.App.2d 47, 72 Cal. Rptr. 906, 41 A.L.R.3d 1353 (1968); *Commonwealth v. Lettrich*, 346 Pa. 497, 31 A.2d 155 (1943); Although the Government must establish a *prima facie corpus delicti* prior to the consideration of any extra judicial statements made by the accused, it need not establish proof of all of the elements of the crime before such consideration. *See Cullen; People v. Hiser; States v. Lung*, 70 Wash.2d 365,

423 P.2d 72 (1967). The order of proof is discretionary. *Id.* The accused's statements, however, may be used to determine the reliability of the evidence of the *corpus delicti*. *See Lung*, 423 P.2d at 76, *Grimes v. State*, 204 Ga. 854, 51 S.E.2d 797, 801 (1949).

In applying the facts of appellant's case to the law set forth above, we find that Bella had not been seen or heard from since the late evening of 16 March 1988. No body has been found. Shorts identified by Bella's best friend as belonging to Bella were found at the beach near the pier. A bedspread identified as one similar to one owned by the Elmore's was also found at the beach near the pier. Appellant's car was seen heading off-base, toward the pier after 0330 of the morning in question. Testimony from a fellow diver was that no one could have swum to the beach in those currents from the end of the pier that night. Appellant's auto and house were both cleaned thoroughly immediately after Bella's disappearance, which was unusual as testimony was that both were generally a mess. Further, all of Bella's identification, including passport, military dependent identification card, working permits and the rest of her clothes and jewelry, were found in the Elmore home during a permissive search. We find the evidence of record sufficient to support a finding that Bella Elmore is dead.

As to the second prong of *corpus delicti* we also find sufficient evidence to support the fact that Bella's death was the result of a criminal agency. A fact finder may regard bloodstains not satisfactorily explained as a circumstance in determining whether or not a murder has been committed. *Wilson v. United States*, 162 U.S. 613, 16 S.Ct. 895, 620, 40 L.Ed. 1090, 1095, (1896). Bella's blood type was A positive. This type of blood was found on the sheets and mattress pad at their house, and the Government's expert testimony, hotly disputed by the defense expert, was that this blood was venous or peripheral blood, and not menstrual blood, as its position and pattern on the sheets and mattress pad would indicate.

It also was present on a knife used for the cleaning and cutting of fish owned by appellant. A pair of stained blue shorts washed up on the beach within days of Bella's disappearance, were positively identified by two of Bella's friends as hers, but had been washed by their finder, so no blood-type identification of the stains was possible. The bedspread, washed up on the beach approximately 6 kilometers from the pier about a month later and identified by Maria Pryor as belonging to the Elmore's, had been saturated with blood, nothwithstanding that any conclusive analysis as to the type or "humanness" of the blood was possible due to its exposure to the elements. We find the Government sufficiently established Bella's death was the result of a criminal agency and thus a *prima facie corpus delicti*. Based upon that finding, and considering the appellant's testimony at trial as well as the implications of his extrajudicial statements and all of the inferences thereto, we find that there is sufficient evidence of record as a matter of law from which the court members could find appellant guilty beyond a reasonable doubt of premeditated murder in violation of Article 118(2), UCMJ.

Having found the evidence legally sufficient to support a finding of guilty, we now turn to the issue of factual sufficiency. The test for factual sufficiency, which we must meet, is "whether, [we] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. at 325. Conviction can be had solely on circumstantial evidence. Additionally, beyond a reasonable doubt does not mean that the evidence must be conflict-free. *United States v. Lips*, 22 M.J. 679 (AFCMR), *pet. denied*, 24 M.J. 45 (C.M.A.1987). On the other hand, in a murder prosecution where a body of the alleged victim cannot be produced, conviction must be based upon cogent circumstances that exclude every reasonable doubt. *Scott*, 1 Cal.Rptr. at 621-622; *Williams*, 28 Fed.Cas. at 643. If the fact finder is convinced that an accused has volunteered false statements

on his own behalf or in response to inquiries from others, that fact finder has the right to consider such statements along with all other circumstances of the case in determining whether the accused's conduct has or has not been satisfactorily explained and to regard false statements as tending to show guilt. *Wilson v. United States*, 162 U.S. 613, 621, 16 S.Ct. 895, 898, 40 L.Ed. 1090, 1095 (1896).

> "The fabrication of false and contradictory accounts by an accused criminal, for the sake of diverting inquiry or casting off suspicion is a circumstance always indicatory of guilt. If the jury believed that the statements made by the prisoner of the occurrence were false, his falsehood was therefore at least a circumstance affording some presumption against his innocence. . . . (Citation omitted.)"

Commonwealth v. Lettrich, 31 A.2d at 156. But we also believe that "[w]here an act may be attributed to a criminal or an innocent cause, it will be attributed to the innocent cause rather than the criminal one." *Riggs*, 201 P. at 281 citing *People v. Ahrling*, 279 Ill. 70, 116 N.E. 764 (1917).

We have considered the evidence of record that appellant believes raises reasonable doubt of his guilt: no body or traces of a body have ever been found; the claim in his petition for a new trial that others saw Bella alive after the date of her alleged death and trial testimony that a woman who resembled Bella was seen in the week after her disappearance, in Carnavon (300 miles from Exmouth) and/or Perth (1000 miles from Exmouth); and, no one witnessed the murder itself or any events occurring at the pier around the time in question. Although the Government expert, Mr. Werner, a serologist, determined the blood on the bedspread and mattress pad was determined to be venous blood, he made that determination by a particular type of test (LDH—Lactate dehydrogenase, which reveals isozyme bands in the blood,

and by the presence or absence of certain of these bands reveals blood to be peripheral (venous) or menstrual) that the defense expert regarded as unreliable, particularly in light of hte age of the stains.

The Government theory of the case appears to be that appellant killed Bella by stabbing her and then throwing her off the pier to conceal her death, though such a direct act (stabbing) was not charged in the premeditated murder specification. Despite the evidence that appellant claims raises reasonable doubt, we find the evidence supports the Government's theory. Appellant put himself on the pier after 3 o'clock in the morning of 17 March, and his story about Bella falling in while he was approaching her from 30 yards away does not ring true in light of his further failure to telephone for help or throw her a life buoy, nonchalantly go home, go to bed and arise the next morning, go to PT formation and not tell anyone of the "accident", even to the extent of not telling his best friend with whom he drove to work that morning. Appellant's actions of deceiving members of his command at Holt, lying to the police concerning his activities that evening, and misleading those who were assisting him in searching the area to find his missing wife, an area he knew she was not, and his concern to search the beach area alone, show strong consciousness of guilt. Additionally, although appellant denied knowledge of the nature and strength of the tides that particular evening, he was a BM3 who was familiar with the pier and its surroundings; and, he was a diver familiar with the treacherous nature of the waters surrounding the pier. His actions and rationale for his actions do not support a reasonable hypothesis of innocence. Considering all of the cogent circumstances, and after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we find that we are legally and factually convinced beyond any reasonable doubt that the appellant murdered his wife, Bella Elmore, and is guilty of the offense of which he was convicted.

In appellant's next assignment of error he argues that the military judge abused his discretion in admitting statements made by the victim because they were hearsay and not relevant. The military judge instructed the members that they could consider the statements "for the limited purpose of establishing what her state of mind was—whether or not she feared the accused and *as it went to their marital status.* You may not consider the evidence for any other purpose. . . ." (Emphasis added.) The defense made a motion *in limine* to prevent the admission of several statements that Bella made as would be testified to by third party witnesses. The military judge denied the motion as to some of the statements and granted as to others; but, as to those he denied, he told the defense: "Now, when and if this evidence is presented, you are certainly free to object to high heaven and draw whatever cautionary instructions you so desire." Upon further discussion between counsel and the military judge, the latter stated:

> Well, let me just say that in ruling on the motion in limine I'm not going to rule on the eventual admissibility or inadmissibility of the evidence or whether or not a cautionary instruction is going to be given. At this point, I can look at the motions of the parties, I can look at your analysis, and I think I can pretty well determine whether or not a blanket prohibition is in order or not and that's all we're talking about at this point. As the evidence develops and the issues are sharpened, focused, if you want to renew any of these motions, please feel free to do so at that time.

The military judge subsequently reiterated the fact, not only at the motion stage of the trial but also during the trial proceedings, that as the objectionable statements were offered, the defense was free to renew its objection for the military judge to make a final decision based on the specific situation at the time.

Of the twelve out-of-court statements appellant now challenges as inadmissible, two were not addressed during the motion *in limine*—"She told me that Wayne tried to kill her"; and, "She said that Wayne tried to choke her." Neither were those statements objected to by defense at the time of the admission. As to the remaining ten, we find that the defense failed to object to the admission of the statements at the time they were offered; it failed, therefore, to preserve any objection. *United States v. Gamble*, 27 M.J. 298 (C.M.A.1988). Furthermore, the defense not only did not object to the limiting instruction given by the military judge but told the military judge that that was now its only concern with regard to the victim's statements that related to the appellant's allegedly pushing her off the boat, smothering her with a pillow, and grabbing her hair and threatening to kill her if she left him. Finally, the defense, at the time, admitted that it had opened the door for the admission of these out-of-court statements. We find that they were admissible as statements tending to rebut the description of the state of appellant's marriage as testified to by Bella's friend upon cross-examination by civilian defense counsel, who thus opened the door and acknowledged that the door was opened. Thus, as to all twelve statements asserted as erroneously and prejudicially admitted by the military judge, we find that any objections were either waived or failed for lack of preservation of the objection.

Appellant cites *United States v. Brown*, 490 F.2d 758 (D.C.Cir.1973), for the proposition that the statements are inadmissible because they were offered by the prosecution solely for the purpose of establishing the victim's state of mind, *i.e.*, fear, of the appellant. *Brown* holds that a victim's extrajudicial statements of fear of a defendant are admissible under the state of mind exception to the hearsay rule only if there is a manifest need of such evidence. Even then it must be accompanied by a limiting instruction that informs the fact finder that such matters are to be considered solely on the issue of the

victim's mental state and not for the truth of the matters contained therein. The "manifest need" qualification relates to whether the extrajudicial statements are relevant to a material issue in the case, such as, self-defense, suicide, or accidental death. *Brown* further holds, however, that at least four factors must be used to determine whether the hearsay evidence of the victim's state of mind should still be excluded because it is too prejudicial to the defendant's case. Those factors are: whether the statements in question recount past acts of the defendant; whether the statements bear proximately on vital issues in the case; whether statements are otherwise corroborated by the evidence; and whether the statements are so inflammatory as to create a substantial danger of undue prejudice. *Id.* at 775-777. The principal distinction between appellant's case and Brown's is that Brown preserved his objections. Appellant did not. Appellant's counsel agreed that the door was open to impeach the defense theory of a satisfying marital relationship, did not renew or initially object to the statements when offered, and did not object to the limiting instructions given by the military judge. In fact, at one point, civilian defense counsel specifically stated: "I agree with you, Your Honor. There's no question about her state of mind being very relevant."

The other distinction between appellant's case and Brown's is that the military judge admitted the statements on two grounds, fear of the victim and the state of the Elmore marital status. Both grounds go to support proof of the *corpus delicti* in that they provide evidence of means, motive and opportunity. Finally, even if the statements identified by appellant as prejudicial to him were declared inadmissible by our adopting the *Brown* principle, we would find that their exclusion would not change the results because of the substantially similar testimony given by other witnesses during the trial. Those statements, similarly, were never requested to be suppressed by a motion *in limine*, objected to at the time of their admission, nor assigned as error on re-

view. Accordingly, if there was error, which we do not find, the error was harmless.

As to appellant's fourth assignment of error, our review of the record leads us also to the conclusion that civilian defense counsel's failure to object to the admission of the out-of-court declarations by the victim as assigned by appellant on review as well as his failure to object to testimony relating to specific instances of misconduct was not ineffective assistance of counsel.. As we read the defense presentation throughout the proceedings, the civilian defense counsel's approach to appellant's case was based upon a trial strategy of trying to attack the credibility of Filipino witnesses as supported by the credibility of his client. This Court will not second-guess defense trial strategy or tactics on review. *United States v. Jefferson*, 13 M.J. 1 (C.M.A.1982); *United States v. Rivas*, 3 M.J. 282 (C.M.A.1977). Regardless, the defense has failed to overcome the presumption of sound defense trial strategy. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *United States v. Snoberger*, 26 M.J. 818, 821 (ACMR 1988). Even assuming the hearsay statements and specific instances of misconduct were inadmissible and that civilian counsel's performance was deficient, thus meeting the first prong of the test for ineffective assistance of counsel, *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the assertion still fails because appellant fails to show that the deficient performance prejudiced his defense. We arrive at that conclusion because we find that in disregarding the hearsay statements and the specific instances of misconduct, we remain convinced beyond a reasonable doubt of the appellant's guilt based on his four contradictory statements and his conduct subsequent to Bella's disappearance that prove to us the appellant's consciousness of guilt and establish his specific and premediated intent to kill his wife.

Appellant asserts in his fifth assignment of error that the members were improperly informed that the appel-

lant had invoked his Fifth Amendment right against self-incrimination during custodial interrogation. This assertion arises from the circumstances occurring during his questioning by Detective Sergeant Balchin, after appellant had given three inconsistent explanations to the police regarding events of the night of 16 March. Appellant had previously been interrogated by the police on three separate occasions, and had had his residence searched and evidence seized. During the interview in question, Detective Balchin told appellant that he suspected appellant of killing his wife. Appellant broke down and cried, denied he was a killer, asked to see LT Spillane, the station judge advocate, and refused to sign the prepared record of interview or talk further to the police. Appellant claims that the fact that his belated invocation of his right to silence, after being told that he was suspected of murder, "was paraded before the members," clearly suggested to the members that his refusal to cooperate was motivated by guilt; this, he further argues violates the constitutionally based prohibition against use of an individual's refusal to submit to interrogation. As a result of this violation of his rights he was prejudiced, and therefore entitled to a new trial. The Government, citing *United States v. Frentz*, 21 M.J. 813 (NMCMR 1985), states that the defense is indulging in overstatement, that it is harmless error where the members are made aware of appellant's invocation of his Fifth Amendment rights, when, as here, the appellant failed to object to the evidence at trial or make any claim during appellate review that he was induced to testify and explain his invocation of rights because of the potentially prejudicial impact upon his case if he did not answer the Government's evidence pertaining to his invocation of rights. *See United States v. Velez*, 22 M.J. 637, 640 (ACMR 1986). In this case, appellant's termination of his interview with Australian authorities was mentioned only once during the Government's case, and trial counsel made only passing comment on the appellant's

termination of the interview only during her rebuttal closing argument to the members. Civilian defense counsel did, on the other hand, conduct a very extensive cross-examination of Detective Sergeant Balchin on the accuracy of appellant's statements and his desire to terminate the interview and refusal to read and sign the typed verbatim interview. Throughout the cross-examination civilian counsel tried to establish the fact that the interviews of appellant were conducted in a frightening, coercive atmosphere in light of appellant's situation as a young Navy man of whom much was expected, who was being subjected, for the first time in his life, to the total control of the Australian police authorities. The defense theory was that the coercive atmosphere was enhanced by the Australian police because they advised him that he was not Australian; he had no American rights; and, he was now subject to Australian rules.

Although comment upon an accused's invocation of his Fifth Amendment rights is error, we find no possible harm in appellant's case because the defense never objected to the evidence when it came in through the narrative testimony of Detective Sergeant Balchin nor did the defense object at the time of trial counsel's rebuttal argument. Additionally, "however inadmissible such evidence may have been upon proper objection, such evidence is only excludable as a shield against utilizing the appellant's invocation of rights. *See United States v. Fairchild*, 505 F.2d 1378." *Frentz*, 21 M.J. at 818. Where, as here, appellant himself testifies (with no qualifications that such testimony was offered solely to protect himself from the adverse impact created by the prosecution's evidence) on direct examination about his invocation of his rights and where civilian defense counsel's extensive use of that evidence during cross-examination and inferences to it during closing argument become part of the defense strategy for attacking the credibility of the Government's witness' testimony regarding the conduct of the interview and as an explanation for the various inconsistent

statements made by appellant, such strategy adopts the shield as a sword and the consequences thereof must be borne by the swordbearer. *See Frentz*, 21 M.J. at 818. We are convinced that no error was committed; but, even assuming error was committed, we are further convinced beyond a reasonable doubt that any such error was harmless. *Id.*

As to appellant's sixth assignment of error, *i.e.*, whether the appellant's constitutional rights were violated by the pretrial contact between a Government witness and the court members, the record reveals the following facts. Mr. Werner, the Government expert witnes who testified at trial concerning the presence and type of blood stains on various items, had dinner with the members of the panel the night of 25 July. That date was the first day of trial with the court assembled. The members, when voir dired individually on the communications, were not as one with their answers, but when taken in the light most favorable to appellant, stated that Mr. Werner told them he was a witness at the court-martial, that he was a CID agent who worked at the Army Crime Laboratory in Atlanta, had worked with the FBI on various cases, and testified at other courts-martial. These were not the exclusive topics of conversation, of course; but they were the topics that had any relevance for potentially prejudicing the appellant's case. To compound matters, Mr. Werner breakfasted with three of the members the next morning. Mr. Werner explained the next day that he sat with the members at dinner because the restaurant did not allow patrons to occupy a table by themselves. Mr. Werner testified that he did not realize he was dining with members, and they did not discuss the case. He also testified that he could not have said he worked with the FBI because he never had; but he might have made a comment to the effect that he had gone to school at the FBI Academy.

The defense moved for a mistrial. The military judge found that Mr. Werner's credibility was not improperly

bolstered by these contacts with the members, and that appellant was not harmed by these contacts. He then denied the motion.

It is well-settled military law that *ex parte* communication between court members and witnesses are absolutely forbidden; that such communications will invalidate a finding unless the Government establishes that the contact is harmless. *United States v. Adamiak*, 4 U.S.C. M.A. 414, 15 C.M.R. 412 (1954). In other words, such communications establish a presumption of prejudice that is rebuttable. The military judge determines whether the Government has rebutted the presumption of prejudice. *Adamiak*, 15 C.M.R. at 417. The standard for rebuttal is a 'clear and positive showing' that the improper communication from a third person or witness did not and could not operate in any way to influence the decision." *Id.* at 418.

After reviewing the record, we find that the Government successfully rebutted the presumption of prejudice created by Mr. Werner's two contacts with the court members and that appellant was not prejudiced. Mr. Werner's statements did not relate to either the expertise involved in the appellant's case or anything relevant to the offenses in general. Instead, they were oriented toward a more casual and general conversation. There is no evidence of tampering or attempting to influence the members. Although the conversations between the court members and Mr. Werner were improper, they were harmless. We also note that the member whose memory of the conversation most supported the defense assertion of prejudice was successfully challenged off the court by the defense. We note that with regard to this member's memory, no other court member's memory was in any way similar. *See United States v. Almeida*, 19 M.J. 874, 875 (AFCMR 1985); *but see United States v. Adamiak*. Thus, we also find that the military judge did not abuse his discretion when he denied the defense motion for mis-

trial. *United States v. Jeanbaptiste*, 5 M.J. 374 (C.M.A. 1978).

Whether appellant was unduly prejudiced by the military judge's instruction on attempted murder is the seventh error assigned by appellant. Appellant claims that the military judge's instructions on the elements of attempted murder were prejudicially erroneous. The specification alleging premeditated murder, as instructed upon by the military judge, stated that murder was accomplished by an unknown act of force and violence. His instruction on the lesser included offense of attempted murder was that, if committed, the attempt was accomplished by certain acts, "that is, cut with a knife and throw into shark-infected waters off the navy [*sic*] pier, his wife, Bella Elmore." The defense argues that the practical effect of this "restrictive" instruction on attempted murder was to preclude improperly the members from considering the appellant's guilt of attempted murder on the theory that he attempted to murder her through "an unknown act of unlawful force or violence," and could find the lesser offense only if they found that the appellant had cut his wife with a knife and thrown her off the pier. The Government's response is that appellant's failure to object to the instruction prior to its issuance constitutes waiver of any objection, and that in any event, because only murder, involuntary manslaughter, and negligent homicide were instructed upon (other than attempted murder), the members needed only to conclude that Bella was still alive to either acquit or find him guilty of attempted murder, and that by their finding of guilty to murder the members concluded that Bella was dead, precluding any consideration of attempted murder as an offense. We find that the instruction was not objected to by the defense either at the time the military judge discussed with the parties the instructions to be given or at the time it was, in fact, given to the members. The failure of the defense to object constituted waiver; the waiver did not constitute plain error; therefore, we find the assignment is without merit.

The defense assertion in its eighth assignment of error that the Government unlawfully suppressed impeachment evidence, which error should have allowed a mistrial motion to be granted, is without merit. The Government conducted extensive tests of a blanket, thinking that forensic evidence might result from it. The blanket in fact did not belong to appellant, and came to be in his possession from UT2 Kanachki, who lent appellant his 4-wheel drive vehicle after Bella's disappearance. The blanket was never offered as evidence at trial, though it was at the Article 32 investigation, and had no impact on the findings in the case. The defense argues that this lack of evidence could have been used to impeach the Government's case, and that the Government was obligated to inform the defense as to why the blanket was not being offered into evidence. Granting of a mistrial is within the discretion of the military judge and is reviewable only for abuse of that discretion. *United States v. Anderson*, 21 M.J. 751, 756 (NMCMR 1985). An abuse of discretion finding is appropriate "only in cases where substantial doubt has been cast upon the fairness or impartiality of the trial." *Id.* at 756. The military judge did not abuse his discretion by refusing to grant a post-trial motion for mistrial. Even had the Government disclosed its reasons for not offering the blanket into evidence, which it was not obligated to do, it did inform the defense prior to trial that it would not be offered, therefore no deliberate and uninformed suppression occurred. In any event, neither the good faith nor bad faith of the prosecution is the test for failure to disclose evidence by the Government. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Even assuming error, we find no chance that the results of the trial would have been different. *See United States v. Eshalomi*, 23 M.J. 12 (C.M.A. 1986) (where the prosecution had deliberately withheld the medical record and previous statement of the victim of an alleged rape, the defense was prejudiced).

Appellant also petitions us for a new trial. We find that the evidence presented by Mr. McKinnon is not newly discovered evidence as required by Article 73, UCMJ, 10 U.S.C. § 873; it is evidence that merely tends to corroborate the testimony of Mr. Yazmadjiam who testified at trial. Besides, we are convinced that Mr. McKinnon's testimony would not have changed the outcome of appellant's court martial in that the testimony of the two witnesses, Mrs. Davies—a Justice of the Peace—and Mr. Yazmadjiam, concerning their similar sightings of a woman resembling Bella after the date of her alleged death as presented by the defense at the time of trial was considered and rejected by the court members. That Mr. McKinnon's sighting was similar to Mr. Yazmadjiam in that the woman he saw was in the same city on the same day in the same general vicinity as the woman seen by Mr. Yazmadjiam, and thus might tend to enhance the credibility of Mr. Yazmadjiam, does not sufficiently persuade us that it was Bella Elmore that either witness saw. Although each witness saw an individual who resembled Bella Elmore, their description of that individual as to her appearance, speech, dress, and conduct are sufficiently different from that described at trial by her friends that we are convinced they were mistaken as to the individual's identity. Even if we accepted Mr. McKinnon's affidavit as newly discovered evidence, we do not find that it would, if considered by a court-martial in light of all other pertinent evidence, probably produce a substantially more favorable result for the appellant. Rule for Courts-Martial 1210(f)(2)(C), Manual for Courts-Martial, United States, 1984.

The petition for new trial is denied. The findings and sentence as approved on review below are affirmed.

Judge WILLEVER and Judge JONES concur.

APPENDIX D

CITATIONS TO CASE LAW IN THE 31 JURISDICTIONS WHICH FOLLOW THE REASONING IN *UNITED STATES v. BROWN*, 490 F.2d 758 (D.C. Cir. 1973) (INCLUDING THE COURTS OF LAST RESORT IN TWENTY-SIX JURISDICTIONS)

Ex parte Bryars, 456 So.2d 1136 (Ala. 1984) (reversed, victim's declarations introduced to show the accused's intent do not fall within an exception to the hearsay rule and no question of suicide, self-defense, or accident was raised); *State v. Charo*, 156 Ariz. 561, 754 P.2d 288 (1988) (reversed, victim's declarations showing fear of defendant irrelevant where defendant did not assert a defense making victim's fear relevant); *People v. Ruiz*, 44 Cal.3d 589, 244 Cal. Rptr. 200, 749 P.2d 854, *cert. denied*, 488 U.S. 871 (1988) (affirmed, victim's declarations of fear of defendant irrelevant where state of mind and acts of victim not placed in issue by defense, but harmless error in light of limiting instruction and other "substantial" evidence); *People v. Madson*, 638 P.2d 18 (Colo. 1981) (reversed, victim's declarations of fear of defendant irrelevant, despite limiting instruction, where defendant did not raise suicide or accident); *State v. McIntosh*, 199 Conn. 155, 506 A.2d 104 (1986) (affirmed, victim's declaration of fear of defendant relevant where claim of self-defense raised); *State v. Porter*, 587 A.2d 188 (Del. Super. 1990) (victim's declarations of fear of defendant inadmissible unless evidence of accident, self-defense, or suicide presented by defendant; note this court is inconsistent in part with *Brown*, allowing admission of a victim's declarations to rebut evidence of defendant's extreme emotional distress); *Fox v. United States*, 421 A.2d 9 (D.C. 1980) (reversed, victim's declarations of fear of defendant irrelevant where victim's state of mind not in issue); *Correll v. State*, 523 So.2d 562 (Fla. 1988) (affirmed, victim's declarations of fear of defendant inadmis-

sible where victim's state of mind not in issue, but harmless error in view of other evidence); *Dover v. State*, 250 Ga. 209, 296 S.E.2d 710 (1982), *cert. denied*, 459 U.S. 1221 (1983) (affirmed, victim's declarations regarding defendant's threats inadmissible to explain defendant's conduct, but harmless error in light of "overwhelming" evidence); *State v. Goodrich*, 97 Idaho 472, 546 P.2d 1180 (1976) (reversed, victim's declarations of fear of defendant irrelevant where defendant did not raise defense of self-defense, suicide, or accident); *People v. Floyd*, 103 Ill.2d 541, 470 N.E.2d 293 (1984) (reversed, victim's declarations regarding fear of defendant irrelevant where defense of accident not raised and the declarations served no purpose other than creating inference of guilt of defendant); *State v. Fowler*, 248 N.W.2d 511 (Iowa 1976) (reversed, victim's declarations of fear of defendant irrelevant where no defense was raised placing victim's state of mind in issue); *Barnes v. Commonwealth*, 794 S.W.2d 165 (Ky. 1990) (reversed, victim's declarations of fear of defendant and prior acts of violence by the defendant irrelevant because victim's state of mind was not in issue); *State v. Riley*, 532 So.2d 1174 (La. Ct. App. 1988) (affirmed, victim's declarations of fear of defendant relevant where defendant placed victim's state of mind in issue by raising defense of self-defense); *State v. Mahaney*, 437 A.2d 613 (Maine 1981) (affirmed, victim's declarations of fear of defendant irrelevant and erroneously admitted but error harmless where the declarations were merely cumulative of other competent evidence of guilt); *Commonwealth v. Bond*, 17 Mass. App. Ct. 396, 458 N.E.2d 1198 (1984) (reversed, victim's declarations of fear of defendant irrelevant where victim's state of mind not in issue); *People v. White*, 401 Mich. 482, 257 N.W.2d 912 (1977) (reversed, victim's declarations of fear of defendant irrelevant where self-defense, suicide, or accident not raised); *State v. Langley*, 354 N.W.2d 389 (Minn. 1984) (affirmed, victim's declarations of fear of defendant admissible where the defense of

accident placed the victim's state of mind in issue); *Houston v. State*, 531 So.2d 598 (Miss. 1988) (reversed, victim's declarations regarding specific prior acts of violence by defendant inadmissible because great prejudicial effect outweighed "dubious" probative value); *State v. Ford*, 639 S.W.2d 573 (Mo. 1982) (victim's declarations of fear of defendant admissible where defendant's claim of self-defense placed victim's state of mind in issue, but reversed because trial court excluded defense witness' hearsay testimony regarding victim's state of mind); *State v. Magruder*, 234 Mont. 492, 765 P.2d 716 (1988) (affirmed, victim's declarations of fear of defendant admissible where defendant's claim of self-defense placed victim's state of mind in isssue); *Shultz v. State*, 96 Nev. 742, 616 P.2d 388 (1980) (affirmed, victim's declarations of fear of defendant irrelevant where there were no claims of self-defense, suicide, or accidental death, but harmless error where other evidence of guilt "overwhelming"); *State v. Machado*, 111 N.J. 480, 545 A.2d 174 (1988) (reversed, victim's declarations of fear of defendant inadmissible because state of mind not in issue even where admission of defendant placed his relationship with the victim in issue, claiming it was a goood one); *People v. Bent*, 160 A.D.2d 1176, 555 N.Y.S.2d 454 (App. Div.), *appeal denied*, 76 N.Y.2d 937, 564 N.E.2d 676, 563 N.Y.S.2d 66 (1990) (affirmed, victim's declaration of fear of defendant irrelevant, where state of mind not in issue, but harmless error because of "strong" evidence of defendant's guilt); *Moore v. State*, 761 P.2d 866 (Okla. Crim. App. 1988) (affirmed, victim's declarations of fear of defendant admissible where defense of suicide was raised; declarations of victim referring to defendant's past acts were inadmissible; note this court in dicta is inconsistent in part with *Brown*, allowing admission of a victim's declarations to show motive); *State v. Bradley*, 431 N.W.2d 317 (S.D. 1988) (affirmed, victim's declarations of fear of defendant admissible where defendant raised claims of accidental

dealth and suicide); *Love v. State*, 581 S.W.2d 679 (Tex. Crim. App. [Panel Op.] 1979) (reversed, victim's declarations of fear of defendant, admitted under state of mind exception, were used for purposes other than showing the victim's state of mind); *State v. Wauneka*, 560 P.2d 1377 (Utah 1977) (reversed, victim's declarations of fear of defendant irrelevant because victim's state of mind not in issue); *Evans-Smith v. Commonwealth*, 5 Va. App. 188, 361 S.E.2d 436 (1987) (reversed, victim's declarations of fear of defendant irrelevant where claims of self-defense, suicide, or accidental death not in issue even where defendant placed his marital relationship with the victim in issue, claiming it was a good one); *State v. Cameron*, 100 Wash.2d 520, 674 P.2d 650 (1983) (reversed, victim's declaration of fear of defendant not relevant where claim of self-defense not in issue, even where prosecution introduced evidence of self-defense in its case in chief); *State v. Kump*, 76 Wyo. 273, 301 P.2d 808 (1956) (affirmed, victim's declarations of fear of defendant admisisble where defendant raised claim of suicide).

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No. 91-1295

In the Supreme Court of the United States

OCTOBER TERM, 1991

CHARLES WAYNE ELMORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

T. G. HESS
Colonel, USMC

W. F. SHIELDS
Commander, JAGC, USN

J. RICHARD CHEMA
Lieutenant Commander, JAGC, USN

T. S. SUSANIN
Lieutenant, JAGC, USNR
Appellate Government Counsel
Office of the Judge Advocate General of the Navy
Washington, D.C. 20374-1111

QUESTIONS PRESENTED

1. Whether the trial judge committed plain error by admitting statements made by petitioner's wife establishing that petitioner had a motive to murder his wife.

2. Whether petitioner was denied a fair trial due to a dinnertime contact between a government witness and the court-martial panel members in petitioner's case.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	9
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Lock v. *State*, 567 N.E.2d 1155 (Ind. 1991)	8
Remmer v. *United States*, 347 U.S. 227 (1954)	12
Smith v. *Phillips*, 455 U.S. 209 (1982)	12
Tennessee v. *Street*, 471 U.S. 409 (1985)	11
United States v. *Adamiak*, 4 C.M.A. 412, 15 C.M.R. 412 (1954)	7, 12
United States v. *Atkinson*, 297 U.S. 157 (1936)	9
United States v. *Brown*, 490 F.2d 758 (D.C. Cir. 1973)	10, 11
United States v. *Frady*, 456 U.S. 152 (1982)	9
United States v. *Young*, 470 U.S. 1 (1985)	9-10

Constitution, statutes, and rules:

U.S. Const. Amend. VI (Confrontation Clause)	11, 12
Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*:	
Art. 25(d)(2), 10 U.S.C. 825(d)(2)	13
Art. 118, 10 U.S.C. 918	2
Mil. R. Evid.:	
Rule 103(a)(1)	9
Rule 103(d)	9

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. 2a-25a, is reported at 33 M.J. 387. The opinion of the Navy-Marine Corps Court of Military Review, Pet. App. 26a-48a, is reported at 31 M.J. 678.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 30, 1991. A request for reconsideration was denied on November 12, 1991. Pet. App. 1a. The petition for a writ of certiorari was filed on February 10, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner, a Navy third class petty officer, was tried by a general court-martial and convicted of the premeditated murder of his wife in violation of Article 118 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 918. Petitioner was sentenced to confinement for life, a dishonorable discharge, total forfeiture of pay, and a reduction in rank. The Navy-Marine Corps Court of Military Review affirmed the findings and sentence. The Court of Military Appeals granted discretionary review and affirmed.

1. a. Petitioner was a member of the station boat crew at the Harold E. Holt Naval Station in Exmouth, Australia. By March 1988, he had been married to his wife, Bella, for six months, although they had lived together for three years. Tr. 272, 875; Pet. App. 4a. Petitioner and Bella had a history of arguing over money, Tr. 846, 995, and their disagreements sometimes resulted in physical abuse. Tr. 876, 907-908, 946-947. On occasion, petitioner was heard to say that his marriage to Bella had been a mistake, that he wanted to divorce her, and that he wanted to kill her. Tr. 875, 877, 908-909.[1] Early in March, petitioner and Bella had a "particularly vocal, crude, and public argument," Pet. App. 5a, apparently because petitioner believed that Bella was having an affair. Tr. 803, 807, 814, 817.

On March 16, petitioner and Bella went bowling with friends and then to an on-base club for drinks. Tr. 807-808, 830. Before leaving the club, Bella telephoned a friend and indicated that she and petitioner had been fighting. Tr. 953. Petitioner and Bella were seen leaving

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[1] Specifically, petitioner stated on several occasions that he wanted to "cut [Bella] up for shark bait and throw her off the [Navy] pier [at Exmouth]." Tr. 877, 909. Petitioner claimed at trial that those statements were intended as jokes. Tr. 1262.

the base and heading toward their home at about 10:30 that evening. Tr. 672. They were seen driving toward the Navy pier at Exmouth approximately five hours later, between 3:30 and 4:30 the morning of March 17. Tr. 787-789. Bella was never seen again. Several hours later, petitioner began making inquiries to friends as to Bella's whereabouts, Tr. 832, and he reported her as missing on March 18. Tr. 272.

Between March 17 and the time of his testimony at trial some four and one-half months later, petitioner told four different versions of what happened the night Bella disappeared. Pet. App. 29a-31a.[2] Within one month of her

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[2] In petitioner's initial version of events, told to friends and U.S. military and Australian authorities in the days immediately after Bella's disappearance, petitioner stated that he and Bella went home after leaving the club on March 16 and he went right to bed. When petitioner awoke the following morning, he said, Bella was gone. Tr. 273, 304-305, 436-437, 880-881.

Petitioner gave a second version to the Australian police approximately ten days after Bella disappeared. Tr. 426. In that version, petitioner said that he and Bella had a heated argument upon returning home from the club and then went for a drive to resolve their differences. Tr. 438-439. They drove to the Navy pier at Exmouth at approximately 1:00 in the morning, where they continued to argue. Tr. 440. According to petitioner, he became annoyed, left Bella at the pier, and returned home. Tr. 441. Petitioner also claimed to have seen Bella walking alongside the road as he drove to work later that morning, but he neither offered her a ride nor spoke to her at that time. *Ibid.*

In the third version, which petitioner gave when confronted by the police with inconsistencies in the second version, Tr. 442-443, petitioner stated that, while he and Bella argued at the pier, Bella walked to the edge of the pier, to a point where there was a gap in the rail. Tr. 443, 447. As petitioner walked toward her, "she just fell over the rail." Tr. 443. Thinking that "she would swim in" from waters that he knew (from his job responsibilities at the pier) to be shark infested and generally unnavigable, petitioner returned home and went to bed. Tr. 277-278, 443, 882, 1035-1037.

disappearance, a pair of shorts and a bloodstained bedspread subsequently identified as Bella's washed ashore not far from the pier. Tr. 798-799, 821-822, 950-951, 957, 998; PX 45. Several other bloodstained items, including a bedsheet, a pair of jeans, a knife, and a mattress pad, were found in petitioner's home and tested positive for human venous blood. Tr. 371, 376, 622-623, 694, 741-742, 745-747, 749-751.[3] The police also discovered, in the bathroom trash can in petitioner's home, a shredded note in which Bella expressed her feeling that her marriage had been a mistake and that her safety was endangered. Tr. 562-

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Finally, at trial, petitioner claimed that he and Bella left the pier and drove to a lighthouse several miles away where they continued their argument for approximately two hours. Tr. 1276-1278. They then returned to the pier, at which point Bella fell into the water. *Ibid.* In the fourth version of his story, petitioner claimed to have searched for Bella in the area around the pier, including the catwalks beneath it, for 30 to 45 minutes before giving up and going home. Tr. 1284.

[3] While Bella's bloodtype was not established at trial, the blood on the items seized from the home was determined to be type A positive. Tr. 741, 747, 749, 752. Petitioner's bloodtype is O factor positive. Tr. 750. Further, while it is true that the defense's expert witness characterized as "unreliable" the test used by the serologist in determining that the bloodstains were not caused by menstrual blood, Tr. 1202-1203, the defense expert acknowledged that the differentiation between venous blood and menstrual blood "has not been undertaken in Western Australia," Tr. 1201, that he never performed the test utilized by the serologist, Tr. 1219, that he lacked the expertise to do so, Tr. 1217, and that he made his conclusions about the test based on materials he read the week before petitioner's trial, Tr. 1217-1218. Both the serologist and a second government expert, on the other hand, were familiar with the test, and both of them said that any unreliability associated with the test occurs only when it yields a positive result for menstrual blood. Tr. 696, 744-745. Since the tests in this case yielded a positive result for venous blood, both experts agreed that the test results were reliable. *Ibid.*

563; PX 42. Finally, while two residents of Perth claimed to have seen a woman resembling Bella one week after she disappeared, their descriptions of that individual were significantly different from the descriptions of Bella given at trial. Pet. App. 48a. The government also established at trial that Bella was not listed as a passenger on any buses or airplanes that left the Exmouth area during the pertinent period. GXs 61-62, 72; Tr. 267, 857, 1017, 1021, 1031.

b. At trial, the defense moved in limine to suppress approximately 40 statements made by Bella to her friends about her fear of petitioner, his threats to kill her, and his physical abuse of her. AX 7; Tr. 40. While he suppressed most of the statements, the trial judge declined to suppress ten of them, Tr. 164, 166-169, 171-173, because he was "inclined to allow the government to establish a motive by some kind of indication that there was some discord within the marital relationship." Tr. 159. He invited defense counsel, however, to renew his objections if the government attempted to introduce the statements during the trial on the merits. Tr. 161.

During its case in chief, the government introduced petitioner's pretrial statements to the police, which included the assertion that he and Bella had a harmonious relationship. Tr. 305, 436-437, 570-571. The government also offered the testimony of witnesses who had observed just the opposite. Tr. 803, 807, 876-877, 907-909. During cross-examination of one of those witnesses, the defense asked for a description of the degree of affection in petitioner's marriage. The witness responded that petitioner and Bella had displayed a greater degree of affection than that in her own marriage. Tr. 920. The prosecutor then signaled his intention to introduce the ten statements that had not been suppressed in limine, arguing that they were not being offered for the truth of the matter asserted, but to show Bella's state of mind, particularly her

fear of petitioner. Tr. 934. The prosecution also argued that the statements were admissible to rebut the implication that petitioner and Bella had an affectionate marriage, and the defense agreed that the door had been opened. *Ibid.* The trial judge then instructed the court-martial panel members that they were to consider the statements for the limited purpose of determining Bella's state of mind "as it went to their marital status." Pet. App. 17a; Tr. 942.

c. Because petitioner's trial was held in Exmouth, a remote town with limited public accommodations, the panel members and the serologist testifying for the government were all lodged at the same hotel. Tr. 85-86.[4] As a result of the hotel restaurant's policy prohibiting patrons from occupying a table by themselves, the serologist sat with the panel members during dinner after the first day of trial. Tr. 141. Upon learning of that contact between the witness and the panel members, the trial judge voir dired both the serologist and the panel about their dinner conversation. According to the serologist, he was unaware that he was dining with panel members at the time, and nothing about petitioner's case was discussed. Tr. 137-139. Voir dire of the panel members confirmed that the case was not the topic of any conversation and that the members were not influenced in any manner by their contact with the witness. Tr. 85-86, 91, 98-99, 105-106, 113-114, 119, 123-124. At the conclusion of voir dire, the defense challenged the entire panel for cause based on the ex parte communication. Tr. 145. The trial judge denied the challenge because the "casual dinner conversation" did not include "discussion of any issues relevant to this case." Tr. 149.

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[4] Most of the panel members traveled to Australia from Hawaii for the court-martial. Tr. 22.

2. The court of military review affirmed. Pet. App. 26a-48a. It found that Bella's statements[5] were admissible because they "tend[ed] to rebut the description of the state of [petitioner's] marriage as testified to by Bella's friend upon cross-examination by civilian defense counsel, who thus opened the door and acknowledged that the door was opened." *Id.* at 39a. The court also found that the defense waived any objection to the statements and that any error in admitting the statements was harmless given the "substantially similar testimony given by other witnesses during the trial." *Id.* at 39a, 40a, 41a.

With regard to the pretrial contact between the government expert witness and the panel members, the court found that the government successfully rebutted by a "clear and positive showing" the presumption of prejudice the contact created. Pet. App. 45a (citing *United States* v. *Adamiak*, 4 C.M.A. 412, 15 C.M.R. 412 (1954)). Specifically, the court concluded that the discussions at dinner, including the serologist's description of his background, "did not relate to either the expertise involved in [petitioner's] case or anything relevant to the offenses in general. Instead, they were oriented toward a more casual and general conversation." *Ibid.* Accordingly, the court concluded that petitioner was not prejudiced. *Ibid.*

3. The Court of Military Appeals affirmed. Pet. App. 2a-25a. The court found that some of Bella's statements were admissible under the state-of-mind hearsay exception, and that the remaining statements, which recited petitioner's prior threats and assaults against

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[5] In addition to the ten statements identified in the defense's motion in limine, appellate defense counsel specified two additional statements that they argued were erroneously admitted at trial. Pet. App. 25a.

Bella, were not hearsay, because they were not offered for their truth, but instead to show Bella's view of the status of her marriage to petitioner. *Id.* at 19a-20a. The court held that the status of petitioner's marriage was relevant and was "thrust * * * into issue" from the outset by both the prosecution and the defense. *Id.* at 21a. According to the court, the government introduced evidence of petitioner's abuse of, and contempt for, Bella to show motive, intent, and premeditation, and the defense sought to engage in "damage control" by showing that the marriage

> still retained a degree of affection—and certainly the marital condition was no incentive to murder. * * * Further, we agree that the mere fact that [Bella] was going about making all these terrible accusations against [petitioner], if believed, tended to rebut the relatively-harmonious-marriage stance taken by the defense.[6]

Ibid. (citing *Lock* v. *State*, 567 N.E.2d 1155 (Ind. 1991)). Further, the court found that the statements were not prejudicial given that they were "largely redundant of other evidence already in the record." Pet. App. 23a. As a result, the court held that it was not plain error for the military judge to admit the statements. *Id.* at 22a.

With regard to the dinner contact between the government witness and the panel members, the court agreed with the court of military review that

> the prompt and thorough investigation superintended by the military judge clearly established that the inadvertent contact between the witness and the court members did not in fact prejudice [petitioner]

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[6] The court also stated that "the fact that the victim was going about saying these things actually supported the defense theory that she had finally seized the opportunity to make her escape from [petitioner]." Pet. App. 24a.

> or taint the proceedings in any way, appearances notwithstanding. We are confident that the court members were able to evaluate the testimony and opinions of the witness * * * without bias or predisposition.

Pet. App. 15a.

ARGUMENT

1. Petitioner maintains that the trial judge erred by admitting statements made by his wife as to her state of mind. Pet. 7-15. That claim does not warrant review by this Court.

Petitioner asks this Court to decide whether a trial judge may admit the statement of a murder victim regarding her fear of her assailant before she was killed. This case does not present that question, however, because petitioner did not object at trial to the admission of Bella's statements, Pet. App. 16a-17a, 22a, 39a, as petitioner concedes, Pet. 15. For that reason, petitioner has waived his claim that the admission of Bella's statements was erroneous. See Mil. R. Evid. 103(a)(1), (d). He can prevail only if he can prove that the admission of Bella's statements was plain error. The standard for establishing plain error, however, is a rigorous one. The plain error rule "is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *United States* v. *Frady*, 456 U.S. 152, 163 n.14 (1982). The rule may be used "to correct only 'particularly egregious errors,' those that 'seriously affect the fairness, integrity or public reputation of judicial proceedings.' " *United States* v. *Young*, 470 U.S. 1, 15 (1985) (quoting *Frady*, 456 U.S. at 163, and *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936)). A reviewing court must "find that the claimed error not only seriously affected 'substantial rights,' but that it had an unfair prejudicial impact" on the trial. *Young*, 470 U.S. at 17

n.14. In sum, petitioner must prove that a fundamental error adversely affected the result of his trial. Given the government's proof of petitioner's guilt and, in particular, petitioner's highly incriminating succession of inconsistent admissions and recantations,[7] petitioner cannot meet that standard.[8]

The decision below does not conflict with *United States* v. *Brown*, 490 F.2d 758 (D.C. Cir. 1973). To begin with, the defendant in *Brown* objected to the use of the victim's statements, and the court addressed the question of when such statements are admissible over a defense objection. The court did not hold that admission of such statements is always error, much less plain error. Moreover, *Brown* held that such statements are

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[7] As the Court of Military Appeals explained in connection with petitioner's claim of ineffectiveness of trial counsel, Pet. App. 23a: "[Defense] counsel had a horrible set of facts to contend with. Through [petitioner's] successive recantations and admissions, he had established one of the most remarkable examples of consciousness of guilt this Court has ever seen. Further, on his own, [petitioner] had established a motive, an opportunity, and the capability of committing the offense; he placed himself at the scene of the crime; he tendered an implausible, transparent, and self-serving claim of innocence; and he highlighted his destruction and concealment of evidence and his deliberate misdirection of the search for his wife. Coupled with the physical evidence that escaped [petitioner's] cleanup measures and the third-party witnesses, counsel faced a daunting challenge."

[8] In fact, this case involves more than a simple failure to object to the admission of evidence. As the court of military review explained, at trial the defense "admitted that it had opened the door for the admission of these * * * statements." Pet. App. 39a. "In addition," as the Court of Military Appeals observed, "the fact that the victim was going about saying these things actually supported the defense theory that she had finally seized the opportunity to make her escape from [petitioner]." *Id.* at 24a. For these reasons, petitioner is in no position now to complain about the admission of Bella's statements at trial.

admissible if they are relevant to an issue in the case and proper limiting instructions are given. 490 F.2d at 773-774. Here, Bella's statements were admissible on the ground that they rebutted any claim that petitioner and Bella had a harmonious marriage, as the Court of Military Appeals explained, Pet. App. 20a, and the defense did not object at trial to the trial judge's limiting instruction, *id.* at 17a.[9] Finally, the Court of Military Appeals did not disagree with the decision in *Brown*; on the contrary, the court stated that "[i]n principle, we have no disagreement with *Brown*." *Id.* at 20a. Accordingly, the decision below does not conflict with *Brown*.[10]

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[9] Petitioner claims that "[t]he state of mind exception was not an *alternate* theory of admissibility [but] * * * the *only* [theory]," Pet. 9; that the Court of Military of Appeals erred in not reviewing the statements for that limited purpose; and that the challenged statements were "the only evidence from which to infer an intent to kill," Pet. 12. In fact, the theory of relevance that the Court of Military Appeals embraced—that the statements were relevant because they bore on the question whether petitioner's marriage was harmonious—was the focus of attention in all three courts. During the motion in limine, the trial judge clearly stated that evidence of discord within the marriage would be admitted to show motive. Tr. 159. After ruling that the government could present Bella's statements during the government's case-in-chief, the judge instructed the panel members that they could consider those statements "for the limited purpose of establishing what her state of mind was—whether or not she feared the accused *and as it went to their marital status*. You may not consider the evidence for any other purpose[.]" Tr. 942 (emphasis added), quoted at Pet. App. 17a. In addition, because "substantially similar testimony [was] given by other witnesses during the trial," Pet. App. 40a; see Tr. 803, 807, 817, 845-846, 876-877, 908-909; see also GXs 42, 54, petitioner errs in claiming that the challenged statements were the government's only proof of intent to kill.

[10] There is no merit to petitioner's claim that admission of Bella's statements violated the Confrontation Clause. Pet. 7. This Court held in *Tennessee* v. *Street*, 471 U.S. 409 (1985), that the

2. Petitioner maintains that he was denied a fair trial due to the dinner contact between the government's serologist and the court-martial panel members on the first day of trial.[11] According to petitioner, the courts below erred in determining that the government rebutted the presumption of prejudice created by that contact. Pet. 16-18.

The Court of Military Appeals was correct in holding that the contact between the witness and the panel members did not prejudice petitioner or taint the court-martial proceedings. Pet. App. 15a. That holding does not conflict with *Remmer* v. *United States*, 347 U.S. 227 (1954), as petitioner maintains, Pet. 16. *Remmer* held that extrajudicial communications are presumptively prejudicial and that the government must prove that such contacts are harmless. 347 U.S. at 229. In this case, the Court of Military Appeals applied the same standard, based on its own prior decision in *United States* v. *Adamiak*, 4 C.M.A. 412, 15 C.M.R. 412 (1954). That decision acknowledged that such contacts are "absolutely forbidden" and that the government must show that the contacts "did not and could not operate in any way to influence the decision [of the court]." 4 C.M.A. at 417-418, 15 C.M.R. at 417-418. Accordingly, the Court of Military Appeals applied the correct standard in evaluating petitioner's claim.

Moreover, the trial judge was "ever watchful" with regard to the possibility of prejudice, *Smith* v. *Phillips*, 455 U.S. 209, 217 (1982), and conducted a full inquiry to

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Confrontation Clause does not bar the admission of nonhearsay statements made by a declarant who does not testify at trial.

[11] Petitioner's claim, Pet. 6, that the serologist ate breakfast with the panel members on the second day of trial is not supported by the record. Voir dire of the members established that the serologist only approached the members' table as they were leaving and that no conversation ensued. Tr. 113.

ensure that none occurred, Tr. 74-145. During that hearing, the government established that the panel members' conversations with the serologist did not affect their view of his testimony or any other aspect of the case, primarily because nothing about petitioner or his case was discussed. Tr. 85-86, 91, 98-99, 105-106, 113-114, 119, 123-124. The government also established that the only information the serologist told the panel members about himself was background information that he subsequently testified about on direct examination. Tr. 737-739.[12] In sum, although the contact between the members and the witness was unfortunate, it was also "inadvertent," Pet. App. 15a, and petitioner was not prejudiced by it.[13]

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[12] Given the size of the community in which this trial was to take place and the pretrial publicity that this case generated, the trial judge had been concerned about extrajudicial influence from the moment that petitioner elected to be tried by a court-martial panel, instead of by the court. Tr. 18, 20-21, 31. As a result, the members were instructed prior to arriving in Exmouth about the importance of avoiding discussion of the case with anyone. AE 6. According to the senior member of the panel, "[the members] were all aware that we were not * * * to discuss the case with [the witness]." Tr. 85. Moreover, unlike civilian jurors, who are chosen randomly, the court-martial panel members were commissioned officers and were selected to perform the function of trier of fact by "reason of age, education, training, experience, length of service, and judicial temperament." Art. 25(d)(2), UCMJ, 10 U.S.C. 825(d)(2).

[13] Further, as noted by the court of military review, "the member whose memory of the conversation most supported the defense assertion of prejudice[,] was successfully challenged off the court by the defense * * * [W]ith regard to this member's memory, no other court member's memory was in any way similar." Pet. App. 45a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

T. G. HESS
Colonel, USMC

W. F. SHIELDS
Commander, JAGC, USN

J. RICHARD CHEMA
Lieutenant Commander, JAGC, USN

T. S. SUSANIN
Lieutenant, JAGC, USNR
Appellate Government Counsel

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Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Military Appeals

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REPLY BRIEF FOR PETITIONER

JACK B. ZIMMERMANN
Counsel of Record
ZIMMERMANN & LAVINE, P.C.
770 South Post Oak Lane
Suite 620
Houston, TX 77056
(713) 552-0300

JOSEPH B. GILBERT
Major, U.S. Marine Corps
NAVY-MARINE CORPS APPELLATE
REVIEW ACTIVITY
Washington Navy Yard
Building 111
Washington, D.C. 20374-1111
(202) 433-4161

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REPLY BRIEF FOR PETITIONER

ARGUMENT

Respondent's Brief in Opposition to the Petition for certiorari contains two factual inaccuracies and a significant legal analytical error. The Court should be aware of these points before deciding whether to grant certiorari in this case.

First, respondent incorrectly asserts that Petitioner and his missing wife "were seen driving toward the Navy pier . . . between 3:30 and 4:30 the morning of March 17." Brief in Opposition at 3. In fact, the gov-

ernment's witness, a Navy sentry named Crawford testified that: "I was standing there and it was on my 3:30 to 4:30 gate and I was standing and I saw a car, a white Mustang go by." Tr. 789. The witness did not testify to seeing *any* persons, but believed that it was Petitioner's car that he saw in the pre-dawn hours.

Second, respondent asserts that "Petitioner's claim . . . that the serologist ate breakfast with the panel members on the second day of trial is not supported by the record." Brief in Opposition at 12, n.11. In fact, Commander Smith, one of the members, admitted during *voir dire* that: "[The prosecutor's expert witness] sat at our table last night and this morning." Tr. 90. Commander Smith named three other members, Tr. 93, and stated that the breakfast lasted a "[h]alf hour maybe." Tr. 94. The record clearly supports the questions Petitioner presents to the Court, and all logical inferences contained in the petition for writ of certiorari.

Finally, respondent inappropriately relies upon *Tennessee v. Street*, 471 U.S. 409 (1985), while claiming that "There is no merit to petitioner's claim that admission of Bella's statements violated the Confrontation Clause." Brief in Opposition at 11, n.10. In *Tennessee v. Street*, the state introduced an accomplice's confession for the legitimate, *nonhearsay* purpose of rebutting Street's testimony that his own confession was a coerced "copy" of his accomplice's statement. In this case, the prosecutor specifically relied upon the alleged victim's out of court statements about her fear of Petitioner to prove the truth of the matters asserted therein. The trial court admitted the dozen statements under the erroneous theory that while they were hearsay, they were admissible under the "state of mind" exception to the rule prohibiting hearsay evidence. *Tennessee v. Street* is inapposite and the principles set out in *United States v. Brown*, and followed by 31 of the 38 jurisdictions that have addressed this issue, should apply to this case.

CONCLUSION

The Court should consider the above matters and for the reasons set forth in the petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

JACK B. ZIMMERMANN
Counsel of Record

ZIMMERMANN & LAVINE, P.C.
770 South Post Oak Lane
Suite 620
Houston, TX 77056
(713) 552-0300

JOSEPH B. GILBERT
Major, U.S. Marine Corps
NAVY-MARINE CORPS APPELLATE
REVIEW ACTIVITY
Washington Navy Yard
Building 111
Washington, D.C. 20374-1111
(202) 433-4161

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